TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 367

D. S. SOWELL, PLAINTIFF IN ERROR,

vs.

FEDERAL RESERVE BANK OF DALLAS, TEXAS

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED APRIL 26, 1934

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CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court in and for the Northern District of Texas, begun and holden at Dallas, Texas, on the 8th day of January, A. D. 1923, and which said term adjourned on the 5th day of May, A. D. 1923, the Honorable James C. Wilson, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

FEDERAL RESERVE BANK OF DALLAS,

versus No. 3287 At Law.

D. S. SOWELL.

PLAINTIFF'S ORIGINAL PETITION.

Filed December 8, 1922.

The Federal Reserve Bank of Dallas, complaining of D. S. Sowell, would with respect show to the Court:

1.

That plaintiff, Federal Reserve Bank of Dallas, is a corporation organized under the laws of the United States of America, under an Act commonly known as the

Federal Reserve Act, with its principal office and place of business at Dallas, Dallas County, Texas; That the defendant, D. S. Sowell, is a resident of Cleburne, Johnson County, Texas, conducting his business under the trade name of "D. S. Sowell Grain Co."

II.

That heretofore, to wit, the 6th day of April, 1921, the defendant executed and delivered his certain promissory note dated on the day and year aforesaid in the principal sum of Three Thousand Fifty-six and Twenty-five Hundredths ($3,056.25) Dollars, said note maturing on the 6th day of July, 1921, payable to the National Bank of Cleburne, at its banking house in Cleburne, Texas; That said note provides for interest at the rate of ten (10%) per cent per annum from maturity until paid, and provides for an additional amount of ten (10%) per cent of the amount due for attorney's fees if placed in the hands of an attorney for collection after maturity, and providing further that the maker waive protest, notice thereof and diligence in collection, said note being signed "D. S. Sowell Grain Co., By A. B. Deat, Mgr."

III.

That said note was duly indorsed and transferred to this plaintiff by the payee named therein, the National Bank of Cleburne, for a valuable consideration, prior to its maturity.

3 IV.

That the defendant, though often requested, has hitherto refused, and still refuses to pay any part of said

note and that the same has been placed in the hands of an attorney for collection, and the attorney's fees therein provided for have been contracted to be paid, which said attorney's fees are reasonable and the usual compensation for services performed, wherefore the attorney's fee provided for in said note has now accrued.

V.

Plaintiff further avers that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

Wherefore, plaintiff prays that it have judgment against the defendant for the principal amount of said note, together with the interest and attorney's fees provided for in said note, together with its costs in this behalf expended, and for such other relief, special and general, to which it may be entitled, and that it have its execution.

E. B. STROUD, JR.
TOM SCURRY,
Attorney's for Plaintiff.

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4 PLEA FOR JURISDICTION.

Filed January 9, 1923.

Now comes the defendant not for the purpose of appearing or answering herein, but for the purpose of filing this his plea for the jurisdiction of this Court, and says:

I.

That this Court is without jurisdiction to hear and determine this cause, because it appears from the face of plaintiff's petition that the Federal Reserve Bank of Dallas is a corporation, having its principal office and place of business in Dallas, Dallas County, Texas. That its cause of action herein is upon a promissory note, which is payable to bearer. That such note was executed by an individual, to-wit, D. S. Sowell, and was not executed by any corporation, and that same is not a foreign bill of exchange. That the payee in said note is the National Bank of Cleburne, a National Bank, having its domicile in Johnson County, Texas, and that the Federal Reserve Bank of Dallas is the assignee of such note; and that this suit could not have originally been brought by the assignor, to-wit, the National Bank of Cleburne, against the said D. S. Sowell in this Court, and that under and by virtue of the provisions of Section 24 of the Judician Code, defining the jurisdiction of District Courts, it is expressly provided that this Court shall not have cognizance of this suit.

Wherefore, this defendant says that this Court is without jurisdiction to hear and determine this cause, and of this he prays judgment of the Court.

J. D. WILLIAMSON,
Attorney for Defendant.

ANSWER OF DEFENDANT, D. S. SOWELL.

Filed January 9, 1923.

Now comes defendant, not waiving his plea to the jurisdiction herein, but insisting upon such plea and only in event that said plea be overruled and he required to answer, for answer says:

I.

Defendant excepts to the allegations of plaintiff's petition and says that said allegations on their face show that this Court is without jurisdiction to hear and determine this cause, and of this he prays judgment of the Court.

II.

Defendant excepts to the allegations of plaintiff's petition herein, and says that same set up no cause of action as against him, and of this he prays judgment of the Court.

III.

Defendant especially excepts to the allegations of said petition, and says that said petition on its face shows that the note herein sued on was payable at the banking house of the National Bank of Cleburne in Cleburne, Texas, and plaintiff does not allege that said note was presented at said Bank for payment at its maturity, or that this defendant did not have sufficient funds on deposit with said Bank with which to pay said note at its maturity, and of this he prays judgment of the Court.

IV.

By way of answer herein, if so required, now comes the defendant and denies all and singular the allegations in plaintiff's petition contained, and of these, and each of these demands strict proof and puts himself upon the country.

V.

By way of special answer herein, this defendant alleges that the note herein sued on was payable
6 to the National Bank of Cleburne, at its banking house at Cleburne, Texas, on July 6th, 1921. That plaintiff herein holds said note as collateral security, and that under and by virtue of the arrangement as between it and the National Bank of Cleburne that said National Bank of Cleburne was its agent with full power and authority to collect for and on account of said Bank, and he instructed said Bank to charge said note to his account, and did not know same had not been done until after October 17, 1921.

That on the 6th day of July, 1921, this defendant was able and ready to pay same said note and on said date, and had in excess of $3500.00 to his credit in said Bank, which said sum has remained in said Bank unless same was turned over and delivered to plaintiff herein since said day. That under and by virtue of the laws of Texas, that said Bank was authorized to charge his account with the amount of said note, and that it was the duty of said Federal Reserve Bank to have presented said note at said National Bank of Cleburne for payment, or to have presented same to this defendant if he had not funds sufficient with which to pay said note in said bank.

VI.

This defendant further alleges that during all of the times aforesaid, and up to the 17th day of October, 1921, when said National Bank of Cleburne was closed by the Comptroller, that he believed said Bank to be a solvent institution and in good financial condition, and that said Bank under and by virtue of the provisions of the banking law issued its statements and published same showing said Bank to be solvent. That if said Bank was in an insolvent condition, that the plain-
7 tiff herein was fully aware of such facts, but that it through its President did advise the people of Cleburne and Johnson County that said Bank was in a safe and sound financial condition.

That said plaintiff well knew the condition of said Bank and that this defendant had sufficient funds to his credit to pay his said note, and it was its duty to collect same from said Bank. Plaintiff with knowledge of such facts failed to present defendant's note to said Bank at a time when same could and would have been paid. That it well knew that by so doing it was jeopardizing the rights and interest of this defendant, and well knew that by its failure to present said paper for payment that it would cause loss and damage to this defendant.

That by reason of the authority of said Bank to collect from this defendant and by reason of this defendant's instructions to said Bank to charge his account with said note, that said note is now paid, and that by reason of the plaintiff's failure to present said note for payment under the condition and circumstances above alleged, that this defendant is relieved from liability to plaintiff, and it is estopped from maintaining this suit.

VII.

This defendant further alleges that the plaintiff, if it holds this defendant's note, and it should be held that same is unpaid, then that plaintiff holds said note as collateral security and that it was not a purchaser for value of said note, and that it holds adequate security outside of said note for the payment of the indebtedness of said Bank to it, and that under the facts and circumstances above alleged, it would be inequitable and unjust for the plaintiff to enforce the collection of the note sued on herein, but that it should be required, first, to exhaust its other collateral before enforcing the collection of this note, as the National Bank of Cleburne is an insolvent institution, and this defendant
8 cannot reimburse himself out of said Bank for the loss that he will suffer herein; and for that reason this suit should be stayed until the plaintiff has exhausted its securities or until its debts have been paid, and such suit be not further prosecuted.

Wherefore, premises considered, this defendant prays that he go hence without day and recover his costs, or that in event the Court should hold that this cause should continue on the docket, then that said cause be stayed until the plaintiff Bank shall have exhaused its other collateral, and that if said debt be then paid that said suit be dismissed, as he will ever pray.

J. D. WILLIAMSON,
Attorney for defendant.

9 . PLAINTIFF'S FIRST SUPPLEMENTAL PETITION.

Filed March 5, 1923.

Now comes the plaintiff in the above entitled and numbered cause, and files this its first supplemental petition, and for answer to the defendant's original answer says:

I.

Plaintiff excepts to the allgation in defendant's original answer contained, and says that the same constitutes no defense to the cause of action sued upon, and of this prays judgment of the Court.

II.

The plaintiff especially excepts to the following portion of the fifth paragraph of said defendant's original answer: "And that it was the duty of said Federal Reserve Bank to have presented said note at said National Bank of Cleburne for payment, or to have presented same to this defendant if he had not funds sufficient with which to pay said note in said Bank", for the reason, first, that said defendant is the maker of said note sued upon, as alleged in plaintiff's original petition, and that as such he is primarily liable on the instrument, and that presentation of a promissory note is not necessary to charge the party primarily liable thereon; second, for the reason that this plaintiff owed no duty, as alleged by the defendant in that portion of the answer excepted to, and the inclusion of said allegation in said defendant's answer is prejudicial and calculated to influence the minds of the jury against this plaintiff.

Wherefore plaintiff prays that that portion of Paragraph V of the defendant's original answer above quoted be stricken out.

III.

Plaintiff especially excepts to Paragraph VII. of Defendant's original answer as the same constitutes no defense to the cause of action sued upon, and of this prays judgment of the Court.

IV.

Further answering said defendant's original answer, if the same be necessary, this plaintiff denies each and every allegation in defendant's answer contained, and demands strict proof thereof, and of this puts itself upon the country.

V.

Further answering said defendant's original answer, this plaintiff avers that the said note sued upon and described in plaintiff's original petition was acquired by this plaintiff prior to its maturity as collateral to the indebtedness of the National Bank of Cleburne; That said indebtedness is now and has been at all times since plaintiff acquired the note sued upon, a sum far in excess of the amount of said note; That the collection of this plaintiff's indebtedness due it from the National Bank of Cleburne is not insured unless this plaintiff recover on the note sued upon. This plaintiff further avers that the indebtedness of the National Bank of Cleburne to it, for which the note sued upon was given as collateral security, was on October 17, 1921, a sum

approximately $625,400. and that said indebtedness, after applying all collections and credits to which the National Bank of Cleburne might at this time be entitled, is approximately $305,000.00; That the security which this plaintiff has other than the note sued on herein is of doubtful value, and that unless this plaintiff recover on said note sued upon, which said note was taken in good faith, this plaintiff will suffer loss equal to the amount sued for.

Wherefore, premises considered, this plaintiff prays that it have judgment as asked for in its original petition.

CHAS. C. TUFF,
J. M. CHAMBERS,
E. B. STROUD, JR.,
Attorneys for Plaintiff.

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11 VERDICT.

Filed March 5, 1923.

Verdict for the Jury in the Case of
Federal Reserve Bank,

vs. No. 3287.

D. S. Sowell.

We, the Jury, find for the plaintiff in the sum of $3921.07.

E. L. MEADOR, Foreman.

12 JUDGMENT.

Filed March 5, 1923.

On this the 5th day of March, 1923, before Hon. J. C. Wilson, came on to be called the above cause and came Counsel for both parties. Thereupon defendant presented his plea to the jurisdiction, which, after being heard and considered by the Court, was in all things overruled, to which action of the Court defendant excepted and asked for his bill of exceptions, which is by the Court hereby allowed. Thereupon came on to be considered the general demurrer and special exceptions of defendant to plaintiff's petition, which were by the Court in all things overruled, to which action of the Court defendant excepted and asked for his bill of exceptions, which is by the Court hereby allowed.

Thereupon came on to be considered the special exceptions of plaintiff to Paragraphs Five and Seven of defendant's answer, which exceptions were by the Court sustained, to which action of the Court defendant excepted and asked for his bill of exceptions, which is by the Court hereby allowed.

Thereupon all parties announced ready for trial and came a Jury of twelve good and lawful men, to wit, E. L. Meador and eleven others, who were fully impanelled and sworn to try said cause. After the introduction of the evidence and argument of Counsel the Court instructed the Jury to return a verdict for the plaintiff as prayed for, and thereupon the Jury returned into open Court their verdict as follows:

"We the Jury, find for plaintiff in the sum of "$3,921.07. E. L. Meador, Foreman."

which verdict was received and filed by the Court.

It is therefore ordered and adjudged by the Court that plaintiff, Federal Reserve Bank of Dallas, a corporation, do have and recover of and from defendant,
D. S. Sowell, the sum of Three Thousand Nine
13 Hundred and Twenty-one and 07/100 Dollars,
With interest thereon at ten per cent per annum from this date, together with all costs of Court, for which let execution issue.

It is further ordered that defendant be allowed sixty days time in which to settle, have allowed, and file his bills of exception.

JAMES C. WILSON,
District Judge.

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14 DEFENDANT'S BILL OF EXCEPTIONS.

Filed May 3, 1923.

Be it remembered that on the trial of the above entitled cause on March 5, 1923, at Dallas, before the Honorable James C. Wilson, Judge, with a jury, the following proceedings were had:

E. B. STROUD, JR., and
J. M. CHAMBERS,
For the Plaintiff.
J. D. WILLIAMSON,
For the Defendant.

Mr. Stroud:

We offer in evidence the note set forth in the petition, being note No. 1483 dated Cleburne, Texas, April 6, 1921, for the sum of $3056.25, due July 6, 1921, pay-

able to The National Bank of Cleburne, Cleburne, Texas, with interest at the rate of ten per cent per annum from maturity, providing for attorneys fees, etc/, and signed by D. S. Sowell.

B. A. McKINNEY, sworn on behalf of plaintiff and examined by Mr. Stroud, testified as follows:

Q. State your name?
A. B. A. McKinney.
Q. What is your occupation?
A. Governor of the Federal Reserve Bank.
Q. Are you acquainted withe the affairs of the Federal Reserve Bank of Dallas with the National Bank of Cleburne
A. I am.
Q. Are you acquainted with the note that the Federal Reserve Bank acquired and which has just been introduced in evidence.

15 A. Yes, sir: It was tendered to us on the 7th day of April, 1921 and accepted the following day.

A. It was taken as collateral security for the indebtedness of The National Bank of Cleburne.
A. Yes, sir: it was.
Q. Do you know the amount of that indebtedness which this note secured with all credits applied, still remaining unpaid?
A. It is approximately $275,000, I can give you the exact figures if you want them.
Q. It was in excess of the fact amount of this note?
A. Yes, sir.
Q. Approximately $275,000?
A. Yes, sir.

Q. This amount of indebtedness for which this note was pledged as collateral to secure which, was unpaid?

A. Yes sir: that is correct.

Cross Examination.

By Mr. Williamson:

Q. You are familiar with the banking business as conducted by the Federal Reserve Bank?

A. I think I am, yes, sir.

Q. You have been governor of the bank how long?

A. Since January, 1922.

Q. You were connected with the bank prior to that time?

A. I was director in the bank.

Q. Was it by reason of your connection as director that you knew when this note was acquired?

A. Prior to my election as governor—in the summer of 1921, prior to my election as governor, I served as governor a few weeks in the absence of the governor. That, however, began about the 8th day of August and terminated about the

16 Q. The 8th day of August 1921?

A. Yes, sir.

Q. And terminated the latter part of September, 1921.

A. Yes, sir.

Q. It was during that time that you acquired your information relative to the affairs of The National Bank of Cleburne?

A. I have refreshed my memory today by investigating the record.

Q. You did acquire your information beginning with the 8th day of August?

A. I probably had—I served from time to time as member of the Executive Committee and probably had information before going in there as acting governor.

Q. What was the rule and custom of the Federal Reserve Bank during the months of June, July and August as to paper that was discounted with it, at the maturity of that paper what did the Federal Reserve Bank do with it?

A. We have two kinds of paper you might say. We have paper executed direct for rediscount, and then we have paper that is collateral to bills payable. In a case of collateral for bills payable it has not been our custom to send it out for collection. In connection with paper under rediscount—we have sent some out, but in the case of the majority of the banks we have taken it prior to maturity.

Q. Where discount paper it was your custom to send it to the bank where the paper was payable?

A. In connection with rediscount papers, yes, sir, with the exception of some banks we did not accord that privilege to.

Q. You were in the habit and it was your custom to send it directly to the bank at which it was payable and which it was rediscounted?

A. I am speaking now about rediscounting paper, yes, sir.

Q. That's what I am talking about?

A. Yes, sir.

Q. There were some banks, however, that
17 you did not accord that privilege of collecting the paper?

A. Yes, sir.

Q. How did you handle their paper?

A. We notified them of the maturity and held it, we notified the bank, the rediscounting bank.

Q. You would notify the bank that had rediscounted the paper of the maturity of the paper?

A. Of the approaching maturity ot it.

Q. Did you send it out by a collector?

A. In connection with the rediscounting paper?

Q. Yes?

A. Not where we sent it out direct to the bank for collection.

Q. If you did not send direct to the bank for collection, then it was paid at maturity did you send a collector out?

A. Not in every case.

Q. What did you do with The National Bank of Cleburne?

A. At what time?

Q. Say after August 1921, during the time you had charge of the Federal Reserve Bank?

A. Shortly after I went to the Federal Reserve, before some week or ten days I would think, it occurred to me that it would be proper thing to do to present that paper to the indorsing bank for collection.

Q. You then sent the paper down there by Mr. Gentry, he was your messenger?

A. He was the messenger, yes, sir.

Q. Along about the 11th of August you began sending down there by a messenger?

A. Somewhere in that vicinity, I don't know the exact date.

Q. You said you reached the conclusion that it would be proper to send that paper to The National Bank at Cleburne by a messenger?

A. Yes, sir.

Q. Is it not a fact that that conclusion
18 was brought about by your uneasiness as to the condition of the bank?

A. Not necessarily. We had had experience with one bank some months previous—The First National Bank of Hearne, in which we had sent them some paper and authorized them to act as our agent in the collection of it and they collected it and did not remit to us. And that was my judgment, I thought it was better not to constitute The National Bank of Cleburne our agent in the collection of that paper.

Q. Relative to the First National Bank of Hearne—the First National Bank of Hearne, that bank failed?

A. Yes, sir.

Q. It was after the failure of that bank that you discovered that they collected paper that you sent them for collection?

A. There are other cases, I do not call them to mind.

Q. You felt that the condition of The National Bank of Cleburne was such that it would be proper to send a messenger to get the money?

A. The bank was heavily indebted to us. My action in that was not based upon the belief of insolvency, but more of a matter of common business prudence. They owned us heavily and I thought it business prudence to present it that way.

Q. You were willing to trust them in the collection of the paper?

A. I did not want to constitute them our agent in view of their heavy line.

Q. They had an extremely heavy line at that time?

A. I would have to verify it with the figures, but their indebtedness must have been over a half million dollars.

Q. Approximately over six hundred thousand dollars?

A. You are talking about August?

Q. Well, I mean their line in April when it

19 started?

A. About four hundred thousand at the time this note was accepted as collateral.

Q. It was about four hundred thousand?

A. Then, yes, sir.

Q. Along about August it increased to in excess of six hundred thousand dollars?

A. I would think that is correct, I am sure it is about right.

Q. And on account of the heavy indebtedness of it you were unwilling to trust the bank at Cleburne to make the collections and sent your own representative down there to collect it?

A. That is correct—to present it.

Q. Relative to your collateral paper how much collateral paper did you people have?

A. You understand that practically all of our paper was collateral to the direct obligation of the bank.

Q. All of your paper was collateral?

A. I think perhaps along about that time, twenty-five or thirty thousand of rediscount paper, and all of the rest of it was represented by banks and it was secured by this collateral.

Q. Now relative to Mr. Gentry, where did you send him with your collateral for the purpose of making collections on that?

A. That is all he was handling so far as I recall.

Q. Collateral paper?

A. If he was handling any other, it was a negligible amount and I don't remember the amount.

Q. Mr. Gentry formerly lived in Cleburne?

A. If he did I didn't know it.

Q. Mr. Gentry was bringing back, was taking a statement of the general ledger of the bank down there at Cleburne, was he or not, from day to day to show this bank its condition?

A. I don't recollect about that, he may
20 have been.

Q. Do you recall that it was your instructions in order that you might keep up with the condition of The National Bank of Cleburne, it being very heavily involved to the Federal Reserve Bank, at Dallas, that he take a statement of the condition of that bank as reflected by its general ledger?

A. I do not recollect, it is quite probably true, but I do not recollect.

Q. You were keeping with the condition of the bank, the statements of the bank?

A. We were endeavoring to do so, yes, sir.

Q. How long did you have the supervision of these matters?

A. I think I returned to the American Exchange Bank about the 22nd or 23rd of September.

Q. Who came in then and had direct supervision?

A. Mr. Vanzandt.

Q. He continued in charge how long?

A. He continued as governor until the 7th of January following.

Q. He is now in Fort Worth?

A. I think so, I saw him there the other day.

Q. You were a director of the bank at the time of the failure of the National Bank of Cleburne?

A. Yes, sir: I was director.

Q. That bank was closed by the Comptroller on the 17th day of October, 1921?

A. Yes, sir.

Q. The bank is in the hands of Mr. A. P. Wooldridge as receiver now?

A. Yes, sir.

Q. There has been no dividends paid to the creditors of the bank?

A. Been no dividend of the creditors paid out.

Q. So far as you know there are no funds available for that purpose?

21 A. I really don't know; very likely the receiver has some accumulations of funds, but how much, I don't know.

Q. Did you go over the condition of the bank after it was closed by the Comptroller with a view of determining which of its assets were pledged and which unpledged?

A. No, sir.

Q. You do know from your knowledge of the condition of the bank that it will not pay its depositors and creditors in full?

A. I am quite certain it cannot.

Q. You, of course, do not know anything about the individual paper or the notes that are held by the Federal Reserve Bank—the individual paper.

A. No, sir.

Q. You would not undertake to charge your mind with those details?

A. No, I don't know about it.

Re-Direct Examination.

By Mr. Stroud:

Q. You stated that it was a general custom to forward rediscounted notes to the bank for which you rediscounted them for collection prior to maturity?

A. Yes, sir.

Q. You said you did that generally— I'll ask you what your practice always has been and is and was at the time of this counsel inquired about with reference to sending those notes as collateral—what form did you use?

A. These notes.

Q. Rediscounted notes?

A. Rediscounted notes and not secured bills payable?

Q. Yes, sir.

A. We would send them by letter some eight or ten days prior to maturity.

22 Q. That a letter would show—would describe the notes you were sending?

A. Yes, sir. Listed by number, name and amount.

Q. Did you ever send to a bank for collection, unless you specifically authorized the bank to collect the particular note forwarded?

A. The terms of that in substance—while I have not seen a copy of that form for quite a while, the substance is we authorized them to collect it for our account.

Q. And described the particular notes for which authority was given?

A. Yes, sir.

Q. Now then, for the collateral notes, which you have as collateral, you say it is not your practice to forward them as you do the rediscounted notes?

No, sir: whenever we have a direct obligation secured, if it is receivables, that is, it is noted and secured, we do not make a practice of sending that paper out for collection. I want to say this though, in a few instances there are some particular circumstances about a note being payable in another place or something like that, commercial paper, we undertake to send them to some other agency for collection.

Q. Mr. Sowells note you held with the collateral?

A. Yes, Sir.

Q. You never sent that to The National Bank of Cleburne?

A. No, sir; it did not go out.

Q. This note of Mr. Sowell's, I understand you to say, was never forwarded to The National Bank of Cleburne?

A. That's right.

Q. And you said your idea in sending Gentry there to present that or these notes was in order to have the notes presented by Mr. Gentry and not to constitute The National Bank of Cleburne as your agent to collect the notes?

Mr. Williamson:

We object to that as leading and suggestive.

The Court:

It is very leading.

Mr. Williamson:

I would rather the witness would testify.

Mr. Stroud:

Q. Did you authorize the National Bank of Cleburne to collect this note—this note of Mr. Sowell?

A. No.

Q. I'll ask you why you sent Mr. Gentry to present the notes?

A. For the reason that we did not want to constitute The National Bank of Cleburne our agent in that connection.

Mr. Williamson:

Q. You said you did not send the Sowell note by mail to the National Bank of Cleburne—have you any independent recollection about that?

A. Only this, that I know we sent no notes to the National Bank of Cleburne for collection.

Q. It is by reason of your custom or specific instructions?

A. Yes, sir; that is correct.

Q. The Sowell note was one of the notes you gave instructions to Mr. Gentry to collect?

A. I feel absolutely sure of it, I cannot verify that here; he must have had it because he had all the past due notes.

Q. You were sending Gentry to Cleburne from day to day with notes that were past due?

A. Yes, sir.

Q. For collection?

A. Past due and maturing.

(Witness excused).

Plaintiff rested.

24 DEFENDANT'S TESTIMONY.

WILLIAM E. ABBAS, called and sworn and examined by Mr. Williamson, on behalf of defendant, testified as follows:

Q. You were bookkeeper for The National Bank of Cleburne during the spring and summer of 1921 and up to the time the bank closed

A. No, sir. I was a teller.

Q. You were familiar with the books of the bank, however?

A. Just in a general way, I did not make the entries in any of them myself, of course sometimes I would have to make reference to them.

Q. Have you the books or the records of that bank in your possession at this time to reflect the cash on hand from the 6th of June 1921 until the 17th day of October?

A. Yes, sir; I have a general ledger that will show.
Q. I wish you would get that please sir?

Mr. Stroud:
We object to that because it is irrelevant and immaterial, the amount of cash the bank had on hand. I do not seem that this is material to this suit and therefore make the objection.

The Court:
The entire funds of the bank you mean?

Mr. Williamson:
I mean the available cash on hand as far as the cash itself was concerned.

The Court:
You can show that; I overrule the objection.

Mr. Stroud:
We except.

Mr. Williamson:
We don't care about making a record showing it from day to day.

The Court:
If he knows, let him approximate it.

Mr. Williamson:
Q. What was the amount of cash on hand July 6th?
A. I can only state as to what the records show.
Q. What amount is reflected by the records
25 A. July 6th?
Q. Yes, sir.

A. July 6th must have been Sunday or a holiday. No work there, but on the 7th day of July there seems to have been $42,267.21, cash in the vault is the way the item is registered on the ledger here.

A. Now what was the amount of cash on hand say the 11th day of August 1921? That is cash in the vault?

Mr. Stroud:

We do not care to interrupt the testimony, but we want our objections to go to all of these questions.

The Court:

Yes.

The witness:

$39,182.41.

Mr. Williamson:

Q. August 15th?

A. $113,770.28.

Q. How much cash on hand did it have the 15th of September?

A. $113,770.28.

Q. How much the first of October?

A. $36,177.35.

Q. How much cash on hand 15th day of October 1921?

A. $57,885.18.

Q. How much cash did you have on hand the 17th day of October, 1921 when closed by the Comptroller?

A. I happen to know the actual cash was only $415, but there is a bunch of cash items show as cash here $58,361.77. There was only $415. actual cash at the time the bank closed.

Q Then from the 7th of July 1921 to the 15th of October 1921, you as teller of the bank, can you state whether or not you had sufficient cash on hand during banking days for that time, to have paid the check or to have paid the note of Mr. Sowell of $3056.25?

A. I can't say. sometimes the actual cash in the bank would be pretty short but there would be cash items there that possibly could be turned into cash.

26 Q. In other words you would have cash deposited with some other bank?

A. That was very low at times too, you see I did not work the general ledger and I couldn't say except at my window. It was very low in my window at times.

Q. Between those times—practically all the time there was more than sufficient to have paid three thousand dollars of thirty-one hundred dollars?

A. I would think there would have been yes, sir.

Q. Did you know Mr. E. Gentry?

A. Yes, sir. I beg your pardon, I don't believe his initials were E—he is the gentleman with the Federal Reserve—I think his initials were W. D.

Q. My information is "E. Gentry"—he is the gentleman here as a witness?

A. Yes, sir.

Q. When did you become acquainted with Mr. Gentry?

A. Just casually sometime I would say about a month before the bank failed; just met him in the bank there.

Q. Do you know whether Mr. Gentry was at that time connected with the Federal Reserve?

A. Yes, sir; I do.

Q. Did you know he was bringing collections from the National Bank of Cleburne to the Federal Reserve Bank?

A. I didn't know it at the time but I later learned he was, but I did not know it at the time. My business was in the cage there and I had no business with him. He did not present his items to me for collections.

Q. Have you the individual ledger or account there of Mr. D. S. Sowell?

A. Yes, sir; I have the ledger.

A. What was Mr. Sowell's balance on July 6th, 1921, or July 5th 1921—no July 6th?

27 A. There are two accounts here, D. S. Sowell Grain Company and D. S. Sowell.

Q. All right what is the D. S. Sowell Grain Company?

A. What date?

Q. July 6th?

A. $10,784.19.

Q. What was that account on the first day of August—that is the credit balance?

A. Yes, sir; that is what these sheets reflect—August 1st, 1921, $7,935.18.

Q. August 15th?

A. $5,463.65.

Q. September 1st?

A. $2,382.02.

Q. September 25th?

A. There is no work on the 25th, I can give you the 24th.

Q. All right.

A. $481.28.

Q October 1st?

A. $3,696.50.

Q. What was it on the 10th of October?

A. $2,593.35.

Q. In other words, the account fluctuated up and down by deposits and things of that kind?

A. Yes, sir; he changed it practically every day.
Q. What date is that?
A. That is October 10th.
Q. What was it on the 12th?
A. Did not work it that day—the 13th it was $3,573.60.
Q. Mr. Abbas, what was Mr. Sowell's individual account running along at that time?
A. What dates now?
A. I would like to get the same dates as the other, starting July.

28 Mr. Stroud:
We object to any testimony with regard to the balance of D. S. Sowell as an individual, what his balance was.

The Court:
I overrule the objection.

Mr. Stroud:
We except to the ruling of the Court.

The Witness:
Give me the dates now.

Mr. Williamson:
Q. The first one I believe is July 5th, 1921.
A. July 5, 1921, $662.04.
Q. What was it the first day of August?
A. $780.57.
Q. What was it the 15th of August?
A. $782.98.
Q. September 1st?
A. $1520.63.

Q. What was it September 10th?
A. $1638.35.
Q. What was it on October 1st?
A. $1558.72.
Q. October 12th?
A. $199.66.
Q. Mr. D. S. Sowell lived in Cleburne did he not?
A. Yes, sir; he did.
Q. Had a place of business there?
A. Yes, sir.
Q. You I believe, are connected with Mr. A. P. Woolridge, receiver of the National Bank of Cleburne?
A. I was up until a month ago, I am now with the F. & M. Bank of Cleburne.
Q. From your acquaintanceship with the affairs, you became thoroughly acquainted with all the affairs of that bank, can you estimate what amount, if any, the creditors of the bank will receive?
A. That would be just absolutely guesswork, I can tell you what they had when I left there, what
29 he thought he could pay next year possibly around fifteen per cent.
Q. Possibly something like fifteen per cent?
A. Yes, sir; maybe a little more and maybe not that much; that would be owing to collections.

Cross Examination.

By Mr. Stroud:
Q. What was the balance October 17, 1921 of the D. S. Sowell Grain Company?
A. $2248.74.
Q. What was the balance of Mr. D. S. Sowell on October 17, 1921?
A. $173.76.

Q. In other words, Mr. Abbas, on the day the bank closed Mr. Sowell had withdrawn all of the money he had in the bank with the exception of $2248.57 to the credit of the D. W. Sowell Grain Company, $173.76 to his individual credit.

A. That is what the books reflect, yes, sir.

Q. Are you familiar with the manner of handling business at The National Bank of Cleburne with reference to the payment of notes?

A. No, I was not in that division and I couldn't say.

Q. You could not tell if a note of the D. S. Sowell Grain Company came in whether or not the bank had charged that to the account of the D. S. Sowell Grain Company?

A. I couldn't say, I did not handle that at all.

Re-Direct Examination.

By Mr. Williamson:

Q. Relative to October 17th, the balance of Mr. Sowell being $2248.74, is it not a fact that there was a check for a thousand dollars which was given on October 15th by Mr. Sowell to the oil mill there which was charged to his account but for which the oil company was not given credit?

A. It was this way: the Cleburne Oil Company was given a check by Mr. Sowell for a thousand dollars, it was to this grain company account, they were given credit on the books all right. The books show that they got credit but it was some understanding between Mr. Sowell after the bank closed, and the receiver, in regard to it, I can't say just what the details were. It seems that Mr.—

Q. Don't you know that the deposit was returned to the Cleburne Oil Company?

A. The Comptroller ruled that all deposits received after a certain hour should be returned, and this deposit came in that ruling, but including that deposit was this thousand dollars check, so you see the actual cash in deposits—I think only about a hundred dollars was returned, but this thousand dollar check had to be taken up with Mr. Wooldridge, and they had some kind of an agreement about that.

Q. But as far as the thousand dollars was concerned, in other words, the bank could not pay out a thousand dollars worth of its funds?

A. Some transfer from one to the other is the way the books show it.

Q. You don't know whether Mr. Sowell has paid the oil company the thousand dollars?

A. No, sir; I can't say that.

Q. But if that thousand dollars be included his balance would then be $3248.

A. If that check had not been charged up it would have been that way.

31 Mr. Stroud:

As I understand it, about October 15th D. S. Sowell Grain Company gave a check to the Cleburne Oil Mills?

A. The Cleburne Oil Company.

Q. The check was presented to the bank and charged to the account of D. S. Sowell Grain Company?

Deposited to the account of the Oil Company?

A. Yes, sir; that's the way it was.

Q. And those charges and credits remained that way until after the bank closed?

A. Yes, sir. Then after the bank closed by some arrangement between the receiver and Mr. Sowell they

made some agreement to switch it around that you don't know anything about?

A. Yes, sir; some agreement which the Cleburne Oil Company was to prove up less a thousand dollars, or something, not to use that thousand dollars as a credit to the oil company but to use it for the credit of the grain company—I don't know just the details of that.

Mr. Williamson:

The deposits to the Cleburne Oil Company was made as a matter of fact after the Comptrolleer of currency had taken charge of the bank?

A. No, sir. Within the last few minutes of the life of the bank.

Q. A few minutes before he took charge?

A. A few minutes before the bank closed and failed to open up the next day, and then of course the receiver got instructions to know what to do with these deposits during the last few minutes of the life of the bank.

Q. And the Comptroller instucted him to turn the deposit back?

A. To turn it back in—if actual cash came into the bank it was to be turned back, but if just a check transfer, of course it wouldn't.

(Witness excused.)

32 W. D. GENTRY, called and sworn on behalf of the defendant and examined by Mr. Williamson, testified as follows:

Q. What was your occupation in August 1921? August, September and October, 1921?

A. I was with the Member Bank Relations Department of the Federal Reserve Bank here at Dallas. At that time I was doing special work.

Q. What was your special work at that time?

A. During the month of August, during the latter part I was making daily visits to Cleburne.

Q. What was the object of your daily visits to Cleburne?

A. To make collections of checks and notes held by the Federal Reserve Bank.

Q. From what bank?

A. From the bank at Cleburne.

Q. What bank of Cleburne?

A. The National Bank of Cleburne.

Q. Can you tell me about what time you began going down there for the purpose of collecting checks and notes?

A. Yes, sir; about August 23rd.

Q. About the 23rd day of August?

A. Yes, sir; 1921.

Q. What notes did you take down there for collection?

A. I took all the notes that were past due and all the notes that were maturing within the next few days.

Q. What did you do with the notes you took down there?

A. I presented them for payment to the bank and kept them in my possession, delivering them as the payments were made.

Q. Did you go over the books of The National Bank of Cleburne?

A. No, sir.

33 Q. Did you take any statement as to the condition of the bank down there?

A. I took statements from their general ledger sheets.

Q. What general ledger sheet?

A. Yes, sir; I took statements as reflected by the general ledger sheets of the bank.

Q. You would take those statements daily?

A. Not every day, although most every day I took a statement.

Q. Most every day you took a statement of the bank as reflected by its general ledger?

A. Yes, sir.

Q. You would bring those statements back to Dallas and submit them to the Federal Reserve Bank?

A. Yes, sir. Turn the statement in with the report for the day.

Q. Now did you take the note of Mr. D. S. Sowell or D. S. Sowell Grain Company to Cleburne?

A. Yes, sir; it was included in the past due paper that I had; I had it with me, yes, sir.

Q. You took that note?

A. Yes, sir.

Q. Did you present it to the bank for payment?

A. Yes, sir.

Q. Do you know what condition Mr. Sowell's account was in at that time?

A. No, sir.

Q. What officer of the bank did you present it to?

A. Mr. Norwood, Sid Norwood.

Q. Where is he now?

A. I don't know.

Q. What connection did he have with the bank?

A. President of the bank.

Q. Did you take the matter up with any other officer of the bank?

34

A. No, sir?

Q. Did Mr. Norwood tell you why the note was not paid?

A. No, sir; not that I remember.

Q. Did he tell you Mr. Sowell had no deposits to his credit in the bank amounting in excess to the note?

A. No, sir.

Q. You know Mr. Sowell was a resident of Cleburne?

A. No, I didn't know Mr. Sowell.

Q. You knew the D. S. Sowell Grain Company was doing business at Cleburne?

A. I didn't know whether they were doing business in Cleburne or not; we had some notes in the bank made by parties now located at Cleburne. I did not take the time and trouble to find out the location of each party.

Q. The bank at Cleburne had indorsed this note?

A. Yes, sir.

Q. The note was past due?

A. Yes, sir.

Q. Why didn't you collect it from the bank at Cleburne?

A. I presented it to them for payment.

Q. Why didn't you collect it; they had sufficient cash on hand to pay it?

A. They did not pay me.

Q. You gave no notice to Mr. Sowell of the dishonor of his paper by the bank?

A. No, sir.

Q. And not notice was sent by the Federal Reserve Bank?

A. Not that I know of.

Q. How long would you stay in Cleburne when you would go there?

A. I would stay for the day?

35 Q. Stay all day?

A. All day, yes, sir.

Q. How long would it take you to check up the notes that were due on that day with the bank?

A. Would not take but a few minutes, I had a list of the notes with me listed according to their due dates.

Q. Did you stay in and about the bank?

A. Stayed in the bank.

Q. Stayed in the bank?

A. Yes, sir.

Q. Were you waiting for money to come in to pay those notes?

A. Yes, sir.

Q. The bank had sufficient cash on hand with which to take up past due notes, as they matured, did it not?

A. I don't think so. They did not take them up, they took some of them up as payments were made; I would make deliveries of the notes as payments were made, but those notes that weren't paid I could not deliver.

Q. How many times and how often did you carry Mr. Sowell's note down there?

A. I had it with me all the time I was there.

Q. You would have a portfolio with all the notes in it?

A. Yes, sir.

Q. Did you ever look at Mr. Sowell's account?

A. No, sir.

Q. Did you see that he had in excess of a sum sufficient to pay his note?

A. No, sir.

Q. You were going down there for how long, you began about the 23rd of August and you continued how long?

A. Until the bank closed.

Q. Daily until the bank closed?

36 A. I did not go there daily myself, there were some other parties made trips down there in the meantime for me. I started in August and Mr. Munro of the Federal Reserce Bank, and I believe Mr. DeMoss, made some trips down there after I had started, and when they quit I made the trips again.

Q. As far as the Sowell note was concerned, it was due July 6, 1921?

A. Yes, sir.

Q. You carried that down there from the time that note was due as far as you individually were concerned, up to the time the bank closed on the 17th of October, almost daily?

A. Yes, sir. The note was past due, however, when I started going down there.

Q. The note was past due on the 23rd day of August?

A. Yes, sir.

Q. You presented it to the bank and it was not paid?

A. Yes, sir.

Q. You were unwilling to leave the note under your instructions—your instructions were specific not to leave the note with the bank?

A. Yes, sir.

Q. And you did not present the note to Mr. Sowell or to the Sowell Grain Company, nor did you call Mr. Sowell up?

A. No, sir.

Q. Nor ask him anything about it?

A. No, sir.

Q. You knew the Cleburne Bank was in a very shaky condition from your knowledge of it from day to day?

A. I knew they were having difficulty in paying their checks that were received from other banks and drawn on them.

Q. You knew they were having difficulty
37 in paying their checks?

A. Yes, sir.

Q. You knew that they had reached the limit of their borrowing power with the Federal Reserve Bank?

A. No, sir.

Q. You knew the Federal Reserve Bank would not trust them for collection or with the collection of them?

A. Yes, sir; that is the reason they sent me down there.

Q. They would not even send a check to be collected through that bank?

A. No, sir.

Q. You did not take up with any individual whose notes you had, the payment of those notes?

A. No, sir.

Cross Examination.

By Mr. Stroud:

Q. Did you have any opportunity to see the status of D. S. Sowell Grain Company's account or D. S. Sowell individually?

A. No, sir.

Q. Did you have any opportunity to see the money and cash they had in the vault?

A. No, sir.

Q. Did you have any authority to go in the bank and take any of that money regardless of whether they wanted to pay it to you or not?

A. No, sir.

Q. You were sent down there simply for the purpose of presenting these notes payable at The National Bank of Cleburne, as agent for the Federal Reserve at Dallas, and you did that?

A. Yes, sir.

Q. You were carrying with you certain notes
38 held by the Federal Reserve Bank at Dallas?

A. Yes, sir.

Q. Which had been endorsed to it by The National Bank of Cleburne?

A. Yes, sir.

Q. They were payable at The National Bank of Cleburne?

A. Yes, sir.

Q. And you went to Cleburne as the agent of the Federal Reserve at Dallas to present those notes for payment?

A. Yes, sir.

Q. Now did you know anything about the D. S. Sowell Grain Company, where they resided?

A. No, sir.

Q. Did you know Mr. D. S. Sowell?

A. No, sir.

Re-Direct Examination.

By Mr. Williamson:

Q. The Federal Reserve Bank had accepted that note as a class and character of paper which was subject to acceptance by that bank?

A. I don't understand you.

Q. The Federal Reserve Bank had accepted the D. S. Sowell note as a note of the class and character of paper which it was authorized to accept from its member banks?

A. Yes, sir; it accepted it as collateral to the note of The National Bank of Cleburne.

Q. And the Sowell Grain Company note was a note of the class that the Federal Reserve Bank was authorized to accept as collateral?

A. Yes, sir; that is the credit department passed on it.

Q. So the credit department of the bank in passing upon the note as acceptable collateral had information as to Mr. Sowell and as to his credit?

39 A. They had whatever information The National Bank of Cleburne furnished them with.

Q. They had other available sources for information didn't they?

A. They had Dunn & Bradstreet's rating, and perhaps a financial statement of the Sowell Grain Company if the Cleburne bank furnished it.

Q. You asked the bank at Cleburne to show you their general ledger did you not?

A. Yes, sir.

Q. They very readily consented?

A. Yes, sir.

Q. And you took a transcript of it?

A. Yes, sir.

Q. Did you ask them to let you see Mr. D. S. Sowell's account to see how he stood?

A. No, sir.

Q. So you did not make a request to see their respective makers—the makers of these notes?

A. No, sir.

Q. You did not find out whether they had sufficient money so that the National Bank of Cleburne could have charged the note to their account did you?

A. No, sir; I did not make that investigation with any of the notes.

Q. You did not make any such request of the bank down there, did you?

A. No, sir.

(Witness excused.)

Mr. Williamson:

It is agreed between counsel that D. D. McLarty, who was Assistant Cashier of The National Bank of Cleburne, would testify, if he were here, that about the 10th of July, 1921, Mr. D. S. Sowell called at The National Bank of Cleburne to pay his note and asked Mr. McLarty for his note and Mr. McLarty told him his was not there but that they would get it for Mr. Sowell, and Mr. Sowell instructed the bank to charge the note to his account.

Mr. Stroud:

We object to that testimony on the ground that it is irrelevant and immaterial and has no bearing on this case.

The Court:

I overrule the objection.

Mr. Stroud:

We accept.

D. S. SOWELL, defendant, being duly sworn and examined by Mr. Williamson, testified as follows:

Q. Your name is D. S. Sowell?
A. Yes, sir.
Q. You live in Cleburne?
A. Yes, sir.
Q. How long have you lived in Cleburne?
A. About fifteen years.
Q. You were engaged in business there in 1921 and still are under the style of D. S. Sowell Grain Company?

A. Yes, sir.

Q. That was an enterprise owned by you as an individual?

A. Yes, sir.

Q. Mr. Sowell, relative to this note for $3056.25, was there any interest included in that note?

A. The interest was included, yes, sir.

Q. What is the principal of the note and how much of it is interest?

41

A. $3000 was principal.

Mr. Stroud:

We reserve an exception to this testimony; the note is a written instrument and speaks for itself.

The Court:

Yes, it does. What is the purpose of it?

Mr. Williamson:

It is on the question of jurisdiction of this Court as to the amount.

The Court:

All right, you can draw it out of the witness.

Mr. Stroud:

We except for the reason the instrument is in writing and speaks for itself and the Federal Reserve Bank at Dallas is an innocent holder for value of the paper and charged with no knowledge of what may have transpired between the defendant and The National Bank of Cleburne.

The Court

I overrule the objection.

Mr. Stroud:
We except.

Mr. Williamson:
How long had you done business with The National Bank of Cleburne?

A. About fifteen years, ever since I had been in Cleburne and a short time before. Commenced doing business with them before I moved to Cleburne.

Q. I'll ask you to state whether or not this note you hold in your hand was ever presented to you for payment prior to the time that The National Bank of Cleburne was closed by the Comptroller?

A. No, sir.

Mr. Stroud:
We object to that for the reason that it is immaterial and irrelevant, and under the law the defendant was primarily liable and not necessary—

The Court:
I overrule the objection.

Mr. Stroud:
We except.

Mr. Williamson:
Q. Were you living in Cleburne from the 23rd day of August up until the 17th day of October, 1921?

A. Yes, sir; that is my home was there, I
42 was not there all the time.

Q. Were you there a greater part of the time?

A. I was there from the first of September—I was away most of the time from the last of May until the first of September.

A. But from the 1st of September on, were you there most of the time—were you there continuously?

A. Yes, sir; there continuously.

Q. Did you know anything about the condition of the National Bank of Cleburne?

A. No, sir.

Q. Prior to the 17th day of October?

A. No, sir.

Q. In the conversation you had with Mr. McLarty relative to that, were you advised as to who held the note or where it was?

A. No, sir.

Q. Did you know who held the note?

A. No, sir.

Q. I'll ask you to state whether or not you were ready, willing and able to pay the note up to the time the bank failed on the 17th day of October, 1921?

A. I was.

Q. Did you know Mr. W. D. Gentry?

A. No, sir.

Cross Examination.

By Mr. Stroud:

Q. You continued to check on your account at The National Bank of Cleburne did you not, after the maturity of this note?

A. How is that?

Q. I say after this note matured you con-
43 tinued to draw checks on your account at The National Bank of Cleburne?

A. Still done business there in the usual way, yes, sir.

Q. And you knew the note matured on July 6th?

A. Yes, I knew when it was due.

Q. How many inquiries did you make about that note?

A. I couldn't say just how many, my bookkeeper did the most of it.

Q. How many did you make?

A. I think about three perhaps myself.

Q. You knew the note had not been returned to you?

A. I knew I had not gotten it.

Q. You asked the Assistant Cashier of the bank about it and he said the note wasn't there?

A. Yes, sir; he said it was not there, they would get it.

Q. After you acquired that knowledge you drew checks on your account at The National Bank of Cleburne?

A. Yes, sir.

Q. You got it down here on September 1st to where you had a credit balance of $2382.02?

A. Yes, sir; it varied, doing a grain business.

Q. You did not have enough money in that account on September 1st to pay that note?

A. I always had money there or at other places available.

Q. Did not have it on deposit?

A. Might not have had it there that day.

Q. When the bank closed you had drawn that account down to $2248.78?

A. I think that showed the actual cash in the bank at that time.

Mr. Williamson:

Q. That check of a thousand dollars to the Cleburne Oil Company, that was put in there the day the bank closed after they ceased to do business?

A. After they quit paying out, just before the doors closed.

44 Q. State whether or not you took that check up from the Cleburne Oil Company?

A. Yes, sir.

Q. Did you have money at other places or in your possession sufficient to have paid this note if it had been presented?

A. Yes, sir, I had money in two other banks, had money in a bank in Kansas City and money in one of the other banks of Cleburne.

(Witness excused.)

JOHN T. JORDAN, sworn on behalf of defendant and examined by Mr. Williamson, testified as follows:

Q. Your name is John T. Jordan?

A. Yes, sir.

Q. Were you connected with the National Bank of Cleburne during the year 1921?

A. Yes, sir.

Q. In what capacity?

A. Assistant Cashier.

Q. Do you know Mr. W. D. Gentry?

A. Yes, sir.

Q. Did you know him during the time you were connected with The National Bank of Cleburne?

A. Yes, sir.

Q. How often did you see Mr. Gentry from the 23rd day of August on in 1921?

A. Well, I couldn't say exactly, but he was there pretty often though.

Q. He was there almost daily during the time the bank was open?

A. Yes, sir.

45 Q. As Assistant Cashier of that bank state whether or not Mr. Gentry ever presented to you for payment the note of D. S. Sowell Grain Company which was payable at The National Bank of Cleburne and payable to The National Bank of Cleburne?

A. No, sir; he never did present it to me.

Q. Did you ever see that note in the bank in possession of Mr. Gentry?

A. No, sir.

Q. What facilities, if any were accorded Mr. Gentry relative to the books of the bank?

A. None that I know of, except in the afternoon, perhaps he might have looked at the general ledger and just took down what the balance showed to be on the general ledger is all I know of.

Q. He was accorded the privilege of coming in and examining the general ledger?

A. Yes, sir; he looked at the general ledger, I don't know thet he did every day, but occasionally he did.

Q. He could have looked at the individual ledger as well could he not?

A I presume so, had he asked to. I don't know that he ever asked to or ever did look.

Q. You as an employee of the bank were affording him as a representative of the Federal Reserve Bank every facility for investigating the cash on hand and the accounts of the various customers of the bank (Objected to) What was actually done so far as Mr. Gentry was concerned to the books and records of the bank upon his request?

A. I never did talk to Mr. Gentry myself personally, but just as I said, all I know, he has access, when he wanted it to the general ledger in the afternoon he would look I think, and take down the balance there shown on the general ledger.

46 Q. Did he do that daaily?

A. I can't say that.

Q. Would he do it frequently?

A. Yes, sir; he did frequently.

Q. Now did you know whether or not Mr. Sowell called at the bank for a note of $3056.25 that he had executed?

A. Well, Mr. Deats, Mr. Sowell's manager was the one that called yes, sir, perhaps he called two or three or several times, I don't know how many, made mention to Mr. Norwood that he was ready to pay the note.

Q. Was that to Mr. Norwood or to you?

A. Mr. Norwood, I never talked with Mr. Deats about it.

Q. You heard him?

A. Yes, sir; I know that he did.

Q. He called on Mr. Norwood for it?

A. Yes, sir.

Q. And as far as the balance was concerned, Mr. Sowell's balance with the bank, that was reflected by the individual ledger of his account?

A. Yes, sir

Cross Examination.

By Mr. Stroud:

Q. Do you know whether or not the bank actually had in cash the amount of money that the general ledger represented it to have?

A. You mean the date it closed or along at different times?

Q. All along, so for the past three or four months of the bank's existence—of your own knowledge?

A. Well no, some days it would have a right smart cash and some days it would be pretty low.

Q. Didn't they carry what they call cash items and consider those as cash?

A. Yes, sir.

47 Q. And those cash items, in other words the general ledger would reflect cash in the vault, that entry included so-called cash items, were not money at all?

A. Yes, sir.

Q. When the bank closed do you recall what the books showed it to have in cash?

A. No, I don't.

Q. Do you know how much cash they actually had?

A. Well, the evening it closed I know it was very low, it ran right down and practically took all they had the last two or three hours.

Q. How much, approximately, did they have when they closed, do you know?

A. No, I don't know; it was very low.

Q. You said on direct examination that you presumed Mr. Gentry had access to the individual ledgers of the bank, did you ever give him authority to look at them or hear anybody else give him authority?

A. No, sir I never gave him and never heard him ask for it.

Q. Did you ever see him look at the individual ledger?

A. No, sir.

Q. How do you know whether he had authority to look at them or not?

A. No, sir I don't know that he ever asked it.

Mr. Williamson:

Q. The day the bank closed there was quite an active run on the bank, quite a large sum in cash withdrawn from it?

A. Quite an active run the last two hours/ Was not so much—take on Saturday before it closed on Monday the 17th was pay day on the Santa Fe, and we handled and always did handle the big end of that Santa Fe payroll and I expect we paid out something
48 like twenty-five or thirty thousand dollars in cash on Saturday, and it usually would build back up in the next few days; it had built back up some Monday morning, but I don't know just how much we had when this flurry started about two o'clock.

Q. About two o'clock the flurry started and quite a considerable amount of cash was withdrawn?

A. All that was in there, I can't state exactly, I can't state exactly what that amounted to, but they cleaned the cash out between that and three o'clock at the time it closed.

Q. But on Saturday the bank had paid out some twenty-five or thirty thousand dollars?

A. Yes, sir. We had handled the pay-roll there on Saturday.

(Witness excused.)

Mr. Williamson:

That's all, Your Honor.

The Court:

Any further testimony for the plaintiff?

Mr. Stroud:

The defendant closes, Your Honor.

The Court:

Proceed with the argument.

Mr. Stroud:

If the Court please, the plaintiff desires to ask for an instructed verdict. This is a suit on a promissory note and as far as counsel for plaintiff can see there is no semblance of a defense made and we do not think there is any can be made, and we do not think there is any that the Court could properly submit to the jury, and we ask that the plaintiff be given an instructed verdict.

(The jury retired and counsel argued the question of an instructed verdict before the Court, and the Court announced that he would instruct a verdict for the plaintiff, and the jury came back into Court and were instructed to find a verdict for the plaintiff—but before the jury were actually instructed the following proceedings were had):

Mr. Williamson:

We except to the charge of the Court, which is in the form of a peremptory instruction, before the
49 the jury returns their verdict, and before they retire for the consideration of such charge, and for the following reasons:

1. Because under the undisputed evidence in this case the Federal Reserve Bank is the assignee of this note which is made payable to The National Bank of Cleburne.

It is agreed by and between counsel of the National Bank of Cleburne was a National Banking Association organized under the laws of the United States, and that it has its domicile in Cleburne, Johnson County, Texas, which is in the Northern District of Texas.

The defendant will except to the charge of the Court to be submitted in this case:

(1) Because under the undisputed evidence the Court was without jurisdiction to try the case.

(2) Because the undisputed evidence shows that the Federal Reserve Bank held the note in question as collateral security, and it was upon notice of the financial condition of The National Bank of Cleburne, or such state of facts, as if pursued, would have placed it upon notice that said bank was insolvent.

(3) That the Federal Reserve Bank of Dallas failed to collect the said note of D. S. Sowell Grain Company, although the undisputed evidence shows that D. S. Sowell Grain Company, was doing business as D. S. Sowell Grain Company, had sufficient funds to his credit and to the credit of D. S. Sowell Grain Company in The National Bank of Cleburne from the maturity of the note to the 15th day of October, 1921, with which to have paid the note.

(4) That the agent of the Federal Reserve Bank was upon notice of the insolvency of The National Bank of Cleburne, and that he failed to present such note to D. S. Sowell for payment at any time after its maturity prior to the failure of The National Bank of Cleburne, and that by his failure so to do and by his negligence in that regard caused a loss to
50 said D. S. Sowell in the amount of said note or at least to the amount of $2248.34, and to which amount he was entitled to offset or use as a credit upon said note.

5. Because the undisputed evidence in this case shows that the amount in controversy, exclusive of interest was only $3000, and that this Court is without jurisdiction on that account to hear and determine the cause.

The Court:

Gentlemen of the Jury: Whenever it becomes apparent to the Court in the trial of a lawsuit that there are no legal—

Mr. Stroud:

If Your Honor please, if I might interrupt—I made a mistake in figuring that amount—if the Court will hear me just a minute.

Mr. Williamson:

Relative to the amount, before the jury returns a verdict I would like to check that amount.

The Court:

You can check it even after they return it.

(To the jury) Gentlemen of the Jury: Whenever it appears there is no ground shown for recovery, or that there is no legal defense offered, it becomes the duty of the Court to instruct a verdict one way or the other, and it is the view of the Court that there are no legal defenses presented to this note, and for that reason, gentlemen, I am instructing you to return a verdict for the plaintiff for the amount of the note and the interest and atorney's fees, which has been figured here, but apparently is not correct, but that makes no difference, since it will be corrected.

I'll ask the gentleman on the corner seat to sign the verdict. (Which was done).

Mr. Williamson:

It is understood that my exceptions as dictated to the stenographer may be considered?

The Court:

Yes.

51 (The verdict returned was as follows):

We the jury find for the plaintiff in the sum of $3,921.07. E. L. Meador, Foreman."

CASE CLOSED.

I, J. A. Feagan, Shorthand Report for the United States District Court for the Northern District of Texas, hereby certify that the above and foregoing is a true and correct transcript of the testimony and other proceedings had on trial of the above entitled and number cause.

This March 10, 1923.

J. A. FEAGIN,
Shorthand Reporter for the
Northern District of Texas.

52 On this the 2nd day of May, A. D. 1923 and within the time allowed by this Court, defendant duly tendered the foregoing as his Bill of Exceptions herein, which having been seen and examined by the Court and Counsel, is by the Court allowed and approved, and said Bill of Exceptions is fully signed by the Hon. J. C. Wilson, the Judge of said Court before whom said proceedings were had, and same is ordered

by the Court to be filed and made a part of the record herein, which is now accordingly done.

This the 2nd Day of May, A. D. 1923.

JAMES C. WILSON,
Judge of the United States District Court for the Northern District of Texas.

The above and foregoing Bill of Exceptions is hereby approved.

J. M. CHAMBERS,
E. B. STROUD, Jr.,
J. D. WILLIAMSON.
Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed May 3, 1923

The defendant, D. S. Sowell, in this action in connection with his petition for writ of error makes the following assignment of errors, which he avers occurred on the trial of this cause, to-wit:

I

The Court erred in overruling the plea of this defendant to the jurisdiction of the Court.

II

The Court erred in overruling defendant's demurrer to plaintiff's petition to the effect that the Court was without jurisdiction to hear and determine such suit.

III

The Court erred in overruling the First Special Exception set forth in Paragraph Three of defendant's answer to the effect that plaintiff did not allege that the said note sued on was presented at the National Bank of Cleburne for payment at maturity, or that defendant did not have sufficient funds on deposit with said Bank to pay said note.

IV

The Court erred in sustaining the special exception of plaintiff to Paragraph Five of defendant's answer.

V

The Court erred in sustaining plaintiff's exception to Paragraph Seven of defendant's answer, because the facts alleged therein constituted a defense to plaintiff's suit.

VI

The Court erred in sustaining the motion made by counsel for, plaintiff, Federal Reserve Bank of Dallas, that the Court direct the jury to return a verdict in its favor.

VIII

The Court erred in charging the jury to return a verdict for the plaintiff, because the defendant had plead a defence to the note sued on; had presented evidence in support thereof and the jury should have been permitted to have determined the issue involved in said cause.

IX

The Court erred in not submitting for determination, the issues between the parties, to the Jury.

Wherefore, the said D. S. Sowell, plaintiff in error, prays that judgment of the United States District Court for the Northern District of Texas at Dallas entered in this cause be reversed, and that said District Court be directed to grant a new trial of said cause.

J. D. Williamson Attorney for D. S. Sowell.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4169

D. S. SOWELL, Plaintiff in Error,

versus

FEDERAL RESERVE BANK OF DALLAS, TEXAS, Defendant in Error

Error to the District Court of the United States for the Northern District of Texas

J. D. Williamson for Plaintiff in Error.
E. B. Stroud, Jr., Tom Scurry, and Joseph Manson McCormick (Etheridge, McCormick & Bromberg, Charles C. Huff and E. B. Stroud, Jr., on the brief), for Defendant in Error.

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION—Filed Dec. 6, 1923

GRUBB, District Judge:

This is a writ of error from a judgment for the defendant in error (plaintiff in the District Court) against the plaintiff in error (defendant in that Court) for the amount of a promissory note and interest, executed by the defendant, made payable to the National Bank of Cleburne, and by it endorsed to the plaintiff, and pledged as collateral security for an indebtedness in excess of the amount of the note. The National Bank of Cleburne became insolvent and failed to pay its indebtedness to the plaintiff, which proceeded to collect the note. Three objections to the recovery were offered in the District Court, and are here insisted upon.

(1) The defendant questioned the jurisdiction of the District Court upon the ground that the plaintiff was an assignee of the note sued on and his assignee could not have sued the maker upon it in a federal court.

(2) Because the plaintiff, as holder of the note, negligently failed to present it at the place of payment named in it, and negligently failed to notify the maker of its dishonor.

(3) Because the District Court refused to stay the suit until it could be determined whether the other collateral, which the plaintiff held to secure the indebtedness of the National Bank of Cloburne, was sufficient to pay the indebtedness.

1. Jurisdiction of the District Court was conceded unless prevented by reason of the operation of the "assignee clause" of Section 24 of the Judicial Code. It was also conceded that the case was one arising under a law of the United States (Amercian Trust & Bank Company vs. Federal Reserve Bank of Atlanta, 256 U. S., 350), and that the federal courts would have been without jurisdiction in a suit between the original parties to the note. Jurisdiction depended upon whether the assignee clause applied to a case in which the ground of federal jurisdiction was that the case was one arising under a law of the United States. The plaintiff contends and the District Court held that the assignee clause only applied to cases in which federal jurisdiction was acquired by the character of the parties, and not to cases in which it depended upon the character of the subject matter. The assignee clause appeared in the Judiciary Act of 1789 and has remained in substantially like form in all subsequent acts. In the Act of 1789, federal jurisdiction was conferred only as a result of the character of the parties. The United States, aliens and citizens of different states alone could sue in the federal courts by its terms. Jurisdiction was not given in cases arising under a law of the United States, except for a brief period, under the Act of February 13th, 1801; until the passage of the Act of March 3rd, 1875; until that date the assignee clause could not therefore have applied to suits arising under the laws of the United States. The courts further limited its application to cases in which aliens and citizens of different states were parties, by eliminating from its scope suits in which the United States were a party. U. S. vs. Greene, 26 Fed. Cases, 33, No. 15,258. Before the Act of March 3rd, 1875, jurisdiction was denied federal corporations, unless their charters expressly authorized them to sue in the federal courts. When such power was expressly conferred, the courts held the assignee clause inapplicable; the suit being one arising under the laws of the United States. Commercial National Bank vs. Simmons. 6 Fed. Cases, 226, No. 3062; Bank of U. S. vs. Planters Bank of Georgia, 9 Wheat. 904. When general jurisdiction was given the federal courts by the Act of March 3rd, 1875, over suits arising under laws of the United States, the necessity for express charter authorization to sue in the federal courts was removed, and the assignee clause became inapplicable to the general ground of jurisdiction, as it had been held to be in cases in which jurisdiction was conferred by special charter. In the Act of 1887, as corrected by the Act of 1888, the position of the assignee clause shows the intention of Congress to have been to limit its application to cases in which jurisdiction was acquired because of the character of

the parties. It came immediately after them, and before the grant of jurisdiction because the case arose under a law of the United States. The change of the position of this clause in the judicial Code is not significant of a change in meaning, in view of Section 295 of the Judicial Code. The case of Wyman vs. Wallace, 201 U. S. 230, is at least persuasive. In that case the assignee clause would have prevented jurisdiction from attaching because of diverse citizenship. It was sustained by the Supreme Court upon the idea that the case was one arising under a law of the United States; the Act of June 30th, 1876, conferring jurisdiction on the federal courts in cases in which the individual liability of a stockholder of a national bank was sought to be enforced, (as was the case in that case) in addition to a recovery on a note. It is true that the Act of Congress conferred jurisdiction of such a proceeding in terms on the federal courts but if the assignee clause had been held to apply to suits arising under the laws of the United States, it would have operated to defeat the jurisdiction so acquired, for the plaintiff claimed by an assignment and his assignor could not have resorted to the federal courts, The Supreme Court, in effect, held that it did not do so, because jurisdiction was acquired, not because of diverse citizenship, but because the case was a suit arising under the laws of the United States; the assignee clause applying to the former, but not to the latter ground of jurisdiction.

2. The note sued on contained a provision that the maker waived protest, notice thereof and diligence in collecting. This provision was in the body of the note, over the signature of the maker. Section 82 of Art. 6001a R. S., Texas, provides that "presentment for payment is dispensed with * * * (3) by waiver of presentment, express or implied." Section III of the same Article provides that: "A waiver of protest, whether in case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protect but also of presentment and notice of dishonor." Section 109 of the same Article provides that: "Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied." Section 110 provides that where the waiver is embodied in the instrument itself, it binds all parties. In view of the waiver of presentment and notice of non-payment and diligence in collecting, which the defendant signed as maker of the note, we find it unnecessary to determine what, if any, duties as to presentment and notice of dishonor, rested upon the plaintiff under the Texas Negotiable Instrument Act.

3. Defendant's contention that the suit should have been stayed until defendant had exhausted its other collateral is untenable in reason and unsupported by authorities. The doctrine of marshalling assets applies only to the case of a junior lien holder, who seeks to compel a senior lien holder to exhaust security, which the senior has, and which the junior has not access to; and only in cases of a common debtor to two creditors for the protection of the junor creditor. It does not require a bona fide holder of

negotiable paper, pledged as collateral to an indebtedness, to proceed first against other collateral because of equities alleged to exist between the original parties to the pledged paper. The obligation of the maker, as to the bona fide holder, is to pay certainly at a fixed time. Payment at the fixed time may be vital to the holder of the paper, especially when it is a bank. The rights of the obligors, on the other collateral, could be determined only in a proceeding to which they were all made parties. Such a determination would involve interminable delay and hopless confusion. No such condition to the payment of the note at maturity entered into the obligation of the maker; and to inject it would be to greatly impair the negotiability of commercial paper, the value of which depends upon the assurance of prompt payment at maturity regardless of equities between the original parties. The authorities are opposed to such an application of the doctrine of marshalling the assets. Haas vs. Bank of Commerce, 60 N. W. 85; Citizens State Bank vs. Iddings, 84 N. Y. 78; Dallemand vs. Bank, 54 Ill. App. 600; Third National Bank vs. Harrison, 10 Fed. 243.

We find no error in the record and the judgment of the District Court is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING AND ORDER OVERRULING SAME—Filed Dec. 20, 1923

On the 6th day of December, A. D. 1923, your Honors filed a written opinion in this cause, affirming the judgment of the District Court of the United States for the Northern District of Texas.

Petitioner, D. S. Sowell, respectfully moves the Court to certify the question of jurisdiction involved in this case to the Supreme Court of the United States, or to grant him a rehearing in said cause upon the following grounds:

I

This Court erred in overruling the First Assignment of Error of the Plaintiff in Error to the effect that the District Court was without jurisdiction to hear and determine this suit, and in holding that the District Court had jurisdiction of a suit by a Federal Reserve Bank as the assignee of a promissory note payable to bearer, and made by an individual, when its assignor, the National Bank of Cleburne, Texas, could not have sued the maker, D. S. Sowell of Cleburne, Texas, upon such note in a Federal Court.

II

This Court erred in holding that a suit by a Federal Reserve Bank on a negotiable promissory note purchased before maturity

and sued upon by it as assignee when its assignor could not have sued in the Federal Court, was a suit arising under the Constitution and laws of the United States, and that the District Court of the United States had jurisdiction of such suit under Section 24 of the Judicial Code.

III

The decision of this Court is in conflict with the decision of the Supreme Court of the United States in the case of Kolze vs. Hoadley, 200 U. S. 76, which holds that where the suit, no matter in what guise it shall be presented, is a suit to recover upon a promissory note or other chose in action by an assignee that the District Court has no jurisdiction, unless the suit might have been prosecuted in such Court to recover on the note if no assignment or transfer had been made, and that the bill or other pleading must contain an averment showing the suit could have been maintained by the assignor if no assignment had been made.

IV

The decision of this Court is in conflict with the decision of the Supreme Court in the case of Parker vs. Omsby, 141 U. S., 81, which holds: "It was settled by many decisions under the Act of 1789 that a Circuit Court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order, unless it appear affirmatively that it could have been maintained in that Court in the name of the original payee."

V

This Court erred in holding that the case of United States vs. Green, 4 Mason, Page 427; Vol. 26, Federal Cases, Page 33, is authority for the holding in the instant case, because in that case Justice Story expressly held that jurisdiction was conferred on the District Court of the United States by the Act of March 3rd, 1815, and not in virtue of the 1789 Statute, and that the Act of March 3rd, 1815, superseded every prior Statute inconsistent with its provisions, and expressly conferred jurisdiction in the District Courts on suits brought by the United States.

VI

This Court erred in holding that the case of Commercial National Bank vs. Simmons, 6, Federal Cases, Page 226, is an authority supporting the holding of the Court in this case, because jurisdiction was held by the Court in that case under the 59th Section of the Act of February 25th, 1863, 12th Statute at Large, 681, which provides: "All suits, actions and proceedings by or against any assocation (National Bank) under the act, may be had in any circuit, district or territorial court of the United States held within the district where such association was established."

VII

This Court erred in holding that the case of the Bank of the United States vs. Planters Bank of Georgia, 9, Wheaten, 904 is an authority for the present holding of this Court, because in that case jurisdiction was expressly conferred upon the District Courts of the United States by an Act of Congress, Third Statutes at Large, Page 266, in following language: "The Bank shall be made able and capable in law to sue and be sued, plead and be impleaded, answer and be answered, and defend and be defended in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."

This was subsequent to the passage of the Assignee Clause of the Act of 1789, First Statutes at Large, and superseded the provisions of the Assignee Clause so far as that Bank was concerned.

VIII

This Court erred in holding that the case of Wallace vs. Weyman, 201 U. S., 230, is authority for its decision, because jurisdiction in that case existed by virtue of Section Two of the Act of June 30th, 1876, 19th Statute at Large, Page, 63, which gives jurisdiction to the Courts of the United States to enforce the individual liability of shareholders in a National Bank, and the case arose, as Justice Brewer says, "Independently of the matter of diverse citizenship.

IX

The decision of this Court is in conflict with the decision of the Supreme Court of the United States in the case of Leather Manufacturers National Bank vs. Cooper, 120 U. S., 778.

X

The decision of this Court is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Houck vs. Bank of Brinkley, 242 Fed., 882.

XI

This Court erred in holding that a suit on a promissory note executed by D. S. Sowell, a resident of Cleburne, Taxas, payable to the National Bank of Cleburne, Texas, and endorsed in blank by that Bank to the Federal Reserve Bank of Dallas, was a suit arising under the laws and Constitution of the United States, and that jurisdiction was thereby conferred on the District Court of the United States to entertain such suit, because such suit being by an assignee could not be regarded for jurisdictional purposes as arising under the Constitution and laws of the United States, and the holding of this Court as to its construction of Section 24 of the Judicial Code is in conflict with the construction of the Supreme Court of the United States of Section 24 of the Judicial Code and the Act of January 28th, 1915, 38th Statute at Large, Page 803;

"No Court of the United States shall have jurisdiction of any action or suit by or against any Railroad Company upon the ground that said Railroad Company was incorporated under an Act of Congress."

In the case of Bankers Trust Company vs. Texas-Pacific Railroad Company, 241 U. S., 295, the Court held that a suit against a Railroad Company so incorporated for jurisdictional purposes could not be regarded as arising under the Constitution or laws of the United States. The language of the above act is almost indentical with the language of Section 24 of the Judicial Code, which provides: "No District Court shall have cognizance of any suit, except upon forign bills of exchange, to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment had been made," and the constructinon should be the same.

XII

The Federal Reserve Act, 38th Statute at Large, Page 251, Section 4, in reference to a Federal Reserve Bank when incorporated provides: "It shall have power; Fourth, to sue and be sued, complain and defend in any Court of law or equity." This power does not confer jurisdiction of all suits by or against that Bank upon the Federal Court, and leaves Section 24 of the Judicial Code in full force and effect as to all of its provisions, and it has been expressly held by the Supreme Court in the case of Bank of the United States vs. Deveaux, 5th Cranch, Page 61, that the use of such language in a charter does not confer jurisdiction on the Courts of the United States over suits instituted by such Banks.

This is a case of first impression upon the question of jurisdiction as to suits by Federal Reserve Banks under the Assignee Section of Section 24 of the Judicial Code, and it is of great importance both to Federal Reserve Banks and to individuals to have the jurisdiction of the Federal Court over suits brought by such Banks as assignee determined; and as such question can be more speedily and less expensively determined by having the question of jurisdiction certified to the Supreme Court for its consideration and determination, your Petitioner moves:

First. That this Court certify the question of jurisdiction involved in this case to the Supreme Court of the United States for its consideration and determination.

Second. If the Court declines to certify such question, then upon the consideration of this motion, that this Court grant a rehearing in this cause.

J. D. Williamson, Attorney for D. S. Sowell, Petitioner.

I, J. D. Williamson, Counsel for the Petitioner herein, do hereby certify that in my judgment the foregoing motion to certify the

question of jurisdiction to the Supreme Court of the United States and for rehearng is well founded, and that same is not interposed for delay.

(Signed) J. D. Williamson, Counsel for D. S. Sowell.

[Title omitted]

It is ordered by the Court that the petition for re-hearing, filed in this cause, be, and the same is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed April 7, 1924

To the Hen. William H. Taft, Chief Justice, or any Associate Justice of the Supreme Court of the United States:

Now comes D. S. Sowell, Plaintiff in Error, by his attorney, and complains that in the record and proceedings and also in the rendition of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, sitting at Fort Worth in the State of Texas, in the above numbered and entitled cause, on the 6th day of December, A. D. 1923, affirming the judgment of the United States District Court for the Northern District of Texas, in said cause, and thereafter making its said decree final by overruling the petition for rehearing of the Plaintiff in Error on the 30th day of January, A. D. 1924, manifest error has intervened to the great damage of Petitioner; that the jurisdiction of the District Court of the United States for the Northern District of Texas, depended upon the fact that the Federal Reserve Bank of Dallas, Defendant in Error, was a corporation created by an Act of Congress, and that its cause of action arose under the laws of the United States: that the amount involved therein and the matter in controversy exceeds the sum of $1,000 besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore, Petitioner prays for an allowance of a Writ of Error to the end that the cause may be carried to the Supreme Court of the United States, and Petitioner prays for a supersedeas of said judgment, and such other process as is required to perfect the Writ of Error prayed for, to the end that error therein may be corrected.

(Signed) J. D. Williamson, Attorney for D. S. Sowell, Plaintiff in Error.

Writ of Error and supersedeas allowed, and bond fixed in the sum of nine thousand ($9,000.00) Dollars; Conditioned, as the law directs.

This the 7th day of April, A. D. 1924.

(Signed) R. W. Walker, Judge United States Circuit Court of Appeals for the Fifth Circuit.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 7th, 1924

The Plaintiff in Error, D. S. Sowell, in this action in connection with his petition for Writ of Error to the Supreme Court of the United States, makes the following Assignments of Error, which he avers occurred in the disposition of this cause by the United States Circuit Court of Appeals for the Fifth Circuit, to-wit:

I

The Circuit Court of Appeals erred in sustaining the judgment of the District Court of the United States and in holding that the District Court had jurisdiction to entertain a suit by a Federal Reserve Bank as the assignee of a note, payable to bearer, executed by an individual, where its assignor could not sue in the Federal Court.

II

The Circuit Court of Appeals erred in overruling the First Assignment of Error of the Plaintiff in Error, that the District Court had no power and jurisdiction to hear and determine this suit.

III

The Circuit Court of Appeals erred in affirming the action of the District Court in sustaining the Special Exception of Plaintiff to Paragraph Five of the Defendant's answer.

IV

The Circuit Court of Appeals erred in affirming the action of the District Court in sustaining Plaintiff's Exception to Paragraph Seven of the Defendant's answer, because the facts therein alleged constituted a defense to plaintiff's suit

V

The Circuit Court of Appeals erred in affirming the action of the District Court in granting a motion to direct a peremptory verdict in favor of Plaintiff, the Federal Reserve Bank of Dallas.

VI

The Circuit Court of Appeals erred in sustaining the action of the trail Court in giving a peremptory charge to the jury to return a verdict for the plaintiff because this Plaintiff in Error, as defendant, had plead a defense to the note sued on; had presented evidence in support thereof, and the jury should have been permitted to determine the issue involved in said cause.

VII

The decision of the Circuit Court of Appeals in holding that the District Court had jurisdiction of this suit, is in conflict with the decision of the Supreme Court of the United States in the following cases:

Kolse vs. Hoadley, 200 U. S., 76
Parker vs. Ormsby, 141 U. S., 81.
Bankers Trust Co. vs. Tex-Pac. Railroad Co., 241 U. S., 295.
Leather Manufacturers' National Bank vs. Cooper, 120 U. S., 778.

VIII

The Circuit Court of Appeals erred in holding that where a note containing a proviso that the maker waives protest, notice thereof, and diligence in collection, it is unnecessary to present such a note for payment at a Bank where by its terms it is made payable and the maker has sufficient funds on deposit to pay such note, because if the maker has funds on deposit sufficient to pay such note, same is equivalent to a tender of payment, and if by failure of the holder to present the note and obtain such funds the funds of the maker are lost by failure of the Bank, he is thereby released from payment of such note.

IX

The Circuit Court of Appeals erred in holding that where the holder of a negotiable note payable at a Bank, which under the Negotiable Instruments Act, authorizes the Bank to charge the note to the account of the maker and the maker has sufficient funds at the Bank to pay the note, knows of the impairment of the financial condition of such Bank, and fails to present such note to the Bank for payment, or to present same to the maker of the note, or notify the maker that his note is not paid, and if the maker be damaged on account of such negligence of the holder, that the maker is not relieved from liability thereby.

X

The Circuit Court of Appeals erred in holding that where a note is held as collateral security and the holder of such note has sufficient collateral to pay its debt, and the maker of the note has a good defense as against the payee, that the holder is not required to first exhaust his other collateral before enforcing collection of the note from the maker.

XI

The Circuit Court of Appeals erred in affirming the action of the District Court, which sustained an exception to a plea urging that the holder had sufficient collateral to pay its debt, and that the maker had a good defense to the note, which was sued upon, and held only by the holder as collateral security, and that the holder should be required first to exhaust its other collateral before suing the maker, and refused to permit evidence as to the amount of security or value thereof, to be admitted in evidence as a defense to the suit.

Wherefore, the said D. S. Sowell, Plaintiff in Error, prays that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in this cause, be reversed, and said cause be dismissed, or that the judgment of the said Circuit Court of Appeals be reversed and this cause be certified to that Court for a proper determination of the issues involved.

(Signed) J. D. Williamson, Attorney for D. S. Sowell, Plaintiff in Error.

Bond on Writ of Error for $9,000—Approved and filed April 16, 1924; omitted in printing

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In United States Circuit Court of Appeals

Præcipe for Transcript of Record—Filed April 8th, 1924

Waco, Texas, April 3rd, 1924.

Mr. Frank H. Mortimer, Clerk United States Circuit Court of Appeals, Fifth Circuit, New Orleans, La.

Dear Sir: You will please prepare transcript of the record in Cause No. 4169, D. S. Sowell, Plaintiff in Error, vs. Federal Reserve Bank of Dallas, Defendant in Error, to be filed in the office of the Clerk of the United States Supreme Court at Washington, D. C., under the Writ of Error granted by Judge R. W. Walker, and include in the transcript the following pleadings, proceedings and papers on file, to-wit:

(1) Plaintiff's original petition.

(2) Defendant's plea to the jurisdiction.

(3) Defendant's answer.

(4) Plaintiff's supplemental petition.

(5) Charge to the jury.

(6) Verdict of the jury.

(7) Judgment of the District Court.

(8) Bill of Exceptions.

(9) Assignments of Error.

(10) Opinion of the United States Circuit Court of Appeals.

(11) Petition for rehearing and motion to certify filed by D. S. Sowell, Plaintiff in Error.

(12) Order of the Circuit Court of Appeals overruling motion to certify and for rehearing.

(13) Petition for writ of error, and supersedeas to the Supreme Court of the United States.

(14) Order allowing writ of error to the Supreme Court of the United States, and fixing supersedeas bond.

(15) Assignments of Error.

(16) Supersedeas Bond on writ of error.

(17) Clerk's certificate to the transcript of the record.

(18) Writ of Error to the Supreme Court of the United States.

(19) Return on writ of error.

(20) Præcipe for transcript of record.

(21) Citation in error to the Supreme Court of the United States.

Said transcript to be prepared as required by law, and the rules of the United States Supreme Court.

(Signed) J. D. Williamson, Attorney for D. S. Sowell, Plaintiff in Error.

We have looked over the above order for record, and agree that same is due from, and that the papers above-mentioned and none others are to be copied in said record on Writ of Error to the Supreme Court of the United States.

(Signed) C. C. Huff, E. B. Stroud, Francis Marion Etheridge, Attorneys for Federal Reserve Bank of Dallas, Texas, Defendants in Error.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing eighty-four pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause wherein D. S. Sowell is plaintiff in error and the Federal Reserve Bank of Dallas, Texas, is defendant in error, numbered 4169, as the same remain on file and of record in my office; said transcript being made up pursuant to the præcipe of counsel filed in said cause and copied at page eighty-three of the transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the city of New Orleans, Louisiana, this 27th day of April, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

UNITED STATES OF AMERICA, ss:

IN UNITED STATES CIRCUIT COURT OF APPEALS

WRIT OF ERROR—Filed April 22, 1924

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between D. S. Sowell, plaintiff in error, and Federal Reserve Bank of Dallas, Texas, defendant in error, No. 4169 of the docket of said Court, a manifest error hath happened, to the great damage of the said D. S. Sowell, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concering the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the Sixteenth day of April, in the year of our Lord one thousand nine hundred and twenty-four.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

Allowed by R. W. Walker, U. S. Circuit Judge.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the defendant in error. Dated 22nd day of April, A. D. 1924.

Frank H. Mortimer, Clerk. (Seal United States Circuit Court of Appeals. Fifth Circuit.)

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ACKNOWLEDGMENT OF SERVICE—Filed April 7, 1924.

J. D. Williamson, Esq., Provident Bldg., Waco, Tex.

DEAR SIR: This will constitute an acceptance of service by Federal Reserve Bank, Defendant in Error in D. S. Sowell, Plaintiff in Error, v, Federal Reserve Bank of Dallas, Defendant in Error, in the Supreme Court of the United States.

Yours truly, F. M. Etherridge. FME. VM.

[File endorsement omitted.]

Endorsed on cover: File No. 30,290. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 367. D. S. Sowell, plaintiff in error, vs. Federal Reserve Bank of Dallas, Texas. Filed April 25th, 1924. File No. 30,290.

FILED
MAR 5 1925
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

D. S. SOWELL,
Plaintiff in Error,
versus
FEDERAL RESERVE BANK OF DALLAS, TEXAS,
Defendant in Error.
No. 367.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF PLAINTIFF IN ERROR.

J. D. WILLIAMSON,
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IN THE

SUPREME COURT OF THE UNITED STATES.

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D. S. SOWELL,
Plaintiff in Error,
versus
FEDERAL RESERVE BANK OF DALLAS, TEXAS,
Defendant in Error.
No. 367.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF PLAINTIFF IN ERROR.

To the Honorable Judges of Said Court:

STATEMENT OF CASE.

The Federal Reserve Bank of Dallas, Texas, a banking corporation, organized under the Federal Reserve Act, filed suit in the United States District Court for the Northern District of Texas at Dallas, on a promissory note dated April 6, 1921, for $3,056.25, due July

6, 1921, payable to the order of the National Bank of Cleburne, a national banking corporation, organized under the laws of the United States, having its domicile in Cleburne, Johnson County, Texas, and **executed by D. S. Sowell, a resident citizen of Cleburne, Johnson County, Texas, doing business under the trade name of D. S. Sowell Grain Company.** Said note in its face provided:

> "We also agree to waive protest, notice thereof and diligence in collecting;"

the Federal Reserve Bank alleging that the note was endorsed in blank by the National Bank of Cleburne, and that it was a holder thereof prior to maturity for value, and it asked for recovery on the note according to its face.

The defendant Sowell filed a plea to the jurisdiction of the court because the Federal Reserve Bank was suing as assignee upon a note payable to bearer, executed by an individual, and that by virtue of Section 24 of the Judicial Code no jurisdiction was invested in the federal court to entertain such suit.

Not waiving his plea to the jurisdiction, but subject thereto, the defendant Sowell pleaded, first, a general denial; second, that the defendant Sowell on July 6, 1921, was ready, able and willing to pay said note, and had in excess of $3,500.00 to his credit in the National Bank of Cleburne, and that under express authorization and also by virtue of the laws

of Texas, the bank was authorized to charge his account with the amount of said note, and it was the duty of the Federal Reserve Bank to have presented said note to the Cleburne Bank for payment, or to have presented same to defendant; third, that defendant, from the maturity of the note, had up to October 17, 1921, when the Cleburne Bank was closed by the Comptroller, believed said bank to be a solvent institution; that if said bank was insolvent, that plaintiff was fully aware of said facts and well knew defendant had sufficient funds to his credit to pay the note; that it was its duty to collect same from the National Bank of Cleburne; that the plaintiff, with knowledge of the condition of said bank, failed to present defendant's note to the bank at a time when same could and would have been paid, and failed to notify defendant of its nonpayment; that by such conduct it well knew it was jeopardizing defendant's rights and would cause a loss to him; that by reason of its failure to present said note for payment and notify defendant of its nonpayment, that defendant is relieved from liability and plaintiff estopped from maintaining suit; fourth, defendant further pleaded that plaintiff held the note as collateral security and that in addition it held adequate security for the payment of its indebtedness, outside of defendant's note; that it should be required to first exhaust its other collateral before enforcing collection of defendant's note, as the National Bank of Cleburne is

an insolvent institution, and the defendant would be caused a loss if he had to pay such note, as he could not reimburse himself against said bank for such loss, and such suit should be stayed until the plaintiff exhausted its other security for its debt.

Plaintiff, by supplemental petition, specially excepted to the defenses urged as above in paragraphs 3 and 4, which special exceptions were sustained by the Court as shown in judgment (Rec., p. 12).

The Court overruled the plea of the defendant to the jurisdiction.

The case was thereupon heard before a jury and after the evidence was introduced the Court gave peremptory instruction in favor of plaintiff in the sum of $3,921.07, and after a jury verdict was returned in accordance with such instruction, judgment was entered for plaintiff.

Plaintiff regularly carried the case to the Circuit Court of Appeals for the Fifth Circuit by writ of error, and upon the hearing the judgment of the District Court was in all things affirmed by the Circuit Court of Appeals on December 6, 1923 (Rec., pp. 58-60). Thereafter petition for rehearing was seasonably filed (Rec., pp. 61-65) and on January 30, 1924, same was denied (Rec., p. 65). Thereupon, on April 7, 1924, plaintiff in error filed his petition for writ of error, which was duly allowed (Rec., pp. 65-66), and he filed assignments of error and supersedeas bond and brings his case regularly before this Court for revision.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. The Circuit Court of Appeals erred in sustaining the judgment of the District Court of the United States and in holding that the District Court had jurisdiction to entertain a suit by a federal reserve bank, as an assignee of a note payable to bearer, executed by an individual, where its assignor could not sue in the federal court.

2. The Circuit Court of Appeals erred in holding where a note containing a proviso that the maker waives protest, notice thereof and diligence in collection, it is unnecessary to present such a note for payment at a bank, where, by its terms, it is made payable, and the maker has sufficient funds on deposit to pay such note, because if the maker has funds on deposit sufficient to pay such note same is equivalent to a tender of payment; and if, by failure of the holder to present the note and obtain such funds, the funds of the maker are lost by failure of the bank, he is thereby released from payment of the note.

3. The Circuit Court of Appeals erred in holding that where the holder of a negotiable note, payable at a bank, which, under the Negotiable Instruments Act, authorized the bank to charge the note to the

account of the maker, and the maker has sufficient funds at the bank to pay the note, knows of the impairment of the financial condition of such bank and fails to present such note to the bank for payment or to present same to the maker of the note, or notify the maker that his note is not paid, that if the maker be damaged on account of such negligence of the holder that the maker is not relieved from liability thereby.

4. The Circuit Court of Appeals erred in holding that where a note is held as collateral security and the holder of such note has sufficient collateral to pay its debt, and the maker of the note has a good defense as against the payee, that the holder is not required to first exhaust his other collateral before enforcing collection of the note from the maker.

BRIEF OF THE ARGUMENT.

The above questions are all raised by the assignments of error 1 to 11, inclusive, pages 66 to 68 of the record, and in this brief they will be discussed in the order in which they are presented.

First Error. The District Court was without jurisdiction. The Federal Reserve Bank of Dallas filed its suit as the assignee of the National Bank of Cleburne, a national banking corporation, organized under the laws of the United States, having its domicile at Cleburne, Johnson County, Texas, against D. S. Sowell, a resident citizen of Cleburne, Johnson County, Texas. (See plaintiff's petition, record pages 1, 2, 3.) The defendant Sowell filed his plea to the jurisdiction (Rec., p. 4), because the plaintiff was suing on a promissory note, payable to bearer, executed by an individual, when its assignor could not have sued on such note. The note sued on was, through inadvertence, not fully set out in the bill of exceptions (Rec., p. 13), but it has been agreed by and between counsel that the original, on file in the District Court in the office of the District Clerk, is as follows:

"No. 14832. Cleburne, Texas, Apr. 6, 1921.
$3,056.25.

On July 6, 1921, after date, without grace, I, we or either of us promise to pay to the order of the National Bank of Cleburne, at its banking

house in Cleburne, Texas, the sum of three thousand fifty-six and 25/100 dollars in current funds, for value received, with interest at the rate of 10 per cent per annum, from maturity until paid, and ten dollars, 10 per cent on the amount due, liquidated damages as attorney's fees should legal process become necessary to collect this note, or if placed in the hands of an attorney for collection after maturity. We also agree to waive protest, notice thereof and diligence in collecting.

D. S. Sowell Grain Company,
By A. B. Deats, Manager."

Endorsed:
"The National Bank of Cleburne,
By D. D. McCarty, A. C."
(Sixty-two cents in revenue stamps attached.)

The plea to the jurisdiction was overruled and an exception allowed in the judgment, as appears in the record on page 12.

It was agreed in open court between counsel, as shown on page 52 of the record, that the National Bank of Cleburne was a national banking association, organized under the laws of the United States, and had its domicile in Cleburne, Johnson County, Texas. D. S. Sowell was an individual doing business under the name D. S. Sowell Grain Company.

The note in suit, under the Negotiable Instrument Law, is payable to bearer. It was executed by an individual, D. S. Sowell, payable to the National Bank of Cleburne, or order, and was endorsed in blank by that bank and delivered to the Federal Reserve Bank. (See paragraphs 2 and 3, plaintiff's petition, page 2 of the record.)

The Negotiable Instruments Act was adopted by the Thirty-sixth Legislature. (See General Laws of Texas, Regular Session, Thirty-sixth Legislature, Chapter 23, page 190.)

Section 9 (5), at page 192, provides:

> "The instrument is payable to bearer (5) when the only or last endorsement is an endorsement in blank."

Section 24 of the Judicial Code provides:

> "The district courts shall have original jurisdiction as follows: First, of all suits of a civil nature at common law or in equity brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states, or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000; and (a) arises under the Constitution or laws of the United States or treaties made, or which shall be made, under

their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects.

"No district court shall have cognizance of any suit, except upon foreign bills of exchange, to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The courts of the United States are courts of limited jurisdiction, and unless jurisdiction be expressly given in a particular case no jurisdiction exists in such courts to entertain suits, either at law or in equity.

The original Judiciary Act of 1789, 1 Statutes at Large, Chapter 20, Section 9, provides:

"The district courts shall have cognizance of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum of $100.00."

Section 11 provides:

"The Circuit Courts shall have original cognizance of all suits at common law or in equity where the matter in dispute exceeds, exclusive

of cost, the sum or value of $500.00, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state.

"No civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of the serving of the writ; nor shall any district or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover the contents of said note, if no assignment had been made except in cases of foreign bills of exchange."

On the 3rd of March, 1815, Congress passed a further act, Third Statute at Large, p. 244, Section 4 provides:

"The District Courts of the United States shall have cognizance concurrent with the courts and magistrates of the several states, and the Circuit Courts of the United States of all suits at common law where the United States or any officer thereof under the authority of any act of Congress shall sue, although the debt, claim or other matter in dispute shall not amount to $100.00."

In the case of the United States v. Green, 4 Mason, page 427, Vol. 26, Federal Cases, page 33, Jus-

tice Story held that the District Court had jurisdiction where the United States as assignee of the Bank of Passamaquoddy filed a suit on a promissory note against Elijah Green. He argues in his decision that the words of limitation in section 11 of the 1789 statute are not applicable to the Government; but, speaking of the words of limitation, says:

> "Yet the words are so direct and positive that I am not sure that I should have been brought to sustain the jurisdiction, if the Act of March 3rd, 1815, had not relieved my doubts. * * * Supposing, therefore the restriction of the eleventh section of the Act of 1789 to apply to suits of the Government in whatever courts instituted, this restriction, not being incorporated into the Act of 1815, leaves its general words in full force. The latter silently operates a repeal of all antecedent limitations which it does not recognize and continue, upon the known principle, that the general authority given by a subsequent statute must be presumed to have intentionally superseded every prior statute inconsistent with its provisions."
>
> "Upon this view of the matter, I am of opinion that the jurisdiction of the District Court is well founded."

The Bank of the United States was incorporated by act of Congress. See First Statute at Large, page 194. As a corporation, it was given the capacity to make contracts; to acquire property; to sue and be sued;

plead and be impleaded; answer and be answered; defend and be defended, in Courts of Record or any other places whatsoever.

Thereafter the Bank of the United States filed a suit against Deveaux et al. and contended that jurisdiction was given in the cause on two grounds:

First. That it, being a corporation composed of citizens of the State of Pennsylvania, might sue Deveaux and Robertson, citizens of the State of Georgia, in the federal courts.

Second. That a right to sue in those courts was conferred on the bank by the law which incorporated it.

Chief Justice Marshall, in passing on the contentions of the Bank in 5 Cranch, page 61, on page 85 says:

> "By the Judicial Act, the jurisdiction of the Circuit Court is extended to cases where the constitutional right to plead and be impleaded, in the courts of the Union, depends on the character of the parties; but where that right depends on the nature of the case the Circuit Courts derive no jurisdiction from that act, except in a single case of a controversy between citizens of the same state claiming lands under grants from different states.
>
> "Unless, then, jurisdiction over this cause has been given to the Circuit Court by some other than the Judicial Act, the Bank of the United States had not a right to sue in that court upon

> the principle that the case arises under a law of the United States. The plaintiffs contend that the incorporating act confers this jurisdiction. That act creates the corporation, gives it a capacity to make contracts, to acquire property, and enables it to sue and be sued. This power, if not incident to a corporation, is conferred by every incorporating act and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear as a corporation in any court which would, by law, have cognizance of the cause if brought by individuals. The Court, then, is of the opinion that no right is conferred on the bank by the act of incorporation to sue in the federal courts."

The second bank incorporated by Congress, under the name of the Bank of the United States, was incorporated by act which appears in the Third Statute at Large, page 266. In the charter granted that bank the following language was used:

> "That the bank shall be made able and capable in law to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction and in any Circuit Court of the United States."

Thereafter the Bank of the United States filed its suit against Osborn et al. The case went to the

Supreme Court of the United States, under the title of Osborn v. Bank of the United States, 9 Wheaten, page 738. Chief Justice Marshall decided the case, and held that the act of incorporation conferred jurisdiction on the Circuit Courts of the United States, if Congress had authority to confer it. He further held that the act was constitutional, and that Congress had the authority to confer jurisdiction on the federal courts as to suits by a corporation organized under the laws of Congress.

The same question was presented in the case of Bank of the United States v. Planters Bank of Georgia, 9 Wheaten, page 904, and in that case the further question was presented as to whether or not the bank as assignee of the note could file its suit in the federal court. The Court held that jurisdiction existed by virtue of the bank's charter, and further held:

> "But the bank does not sue in virtue of any right conferred by the Judicial Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in the Circuit Court of the United States."

We think neither of those cases are conclusive of the question presented here, nor are they persuasive.

Under the Constitution Congress undoubtedly possesses power to invest federal courts with jurisdiction of all suits at law or in equity arising under the Constitution, laws or treaties of the United States. If the act of February 13th, 1801, be not considered because of its early repeal, the first time that this power was expressly conferred upon the courts was by the act of March 3rd, 1875, Eighteenth Statute at Large, page 470. By that act Congress in express terms gave the Circuit Courts original jurisdiction concurrent with the courts of the several states of all suits at law or in equity arising under the Constitution, laws or treaties of the United States where the value of the matter in dispute exclusive of costs was in excess of $500.00. It also continued the jurisdiction as conferred by the act of 1789 and continued the assignee clause. By the act of March 3rd, 1887, Twenty-fourth Statute at Large, 552, that act was amended and the value of the matter in dispute was raised to $2,000.00. The act of March 3rd, 1887, was amended by the act of August 13th, 1888, Twenty-fifth Statute at Large, page 433, and the proviso as to the assignee clause reads as follows:

> "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any

promissory note or other chose in action in favor of any assignee, or other subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

Congress in 1882 by amendment provided that a national bank should be for all purposes regarded as a citizen of the state and county in which its principal office was located, but there was a further proviso that suits arising in winding up the affairs of the bank or by its receiver might be instituted in the federal courts; and that in effect is carried forward in section 24 of the present Judiciary Act, paragraph 16.

After the Act of 1875 the jurisdiction of the Circuit Courts in cases arising under the laws and Constitution of the United States was uniformly followed and applied in direct suits by and against federal corporations, but in none of those cases is it decided that such corporation, as assignee of a chose in action, could sue in the federal court. It was under and by virtue of this provision that the Supreme Court held that jurisdiction existed in the case of American Bank & Trust Company v. Federal Reserve Bank of Atlanta, 256 U. S., page 350, and

were it not for the assignee clause, which has been carried forward since 1789, counsel would not contend that jurisdiction did not exist in the United States District Court over this suit.

In the case of Bank v. Osborn, and in the case of Bank v. Planters Bank of Georgia, jurisdiction was held by Justice Marshall under the statute to be expressly conferred on the federal courts in any suit filed by or against the United States Bank. He expressly held in the case of Bank v. Deveaux that, although under the Constitution jurisdiction was conferred upon the federal courts in suits arising under the Constitution and laws of the United States, that such jurisdiction was not conferred under a charter to a bank which authorized it to sue and be sued in all courts. This same provision is in the act creating the Federal Reserve Bank. Such banks have power to sue and be sued, complain and defend, in any court of law and equity.

Under the Act of 1875, as under the Act of March 3rd, 1911, adopting the Judicial Code, jurisdiction is conferred on the one hand on Circuit Courts and now upon the District Courts where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and (a) arising under the Constitution and laws of the United States, or (b) is between citizens of different states, or (c) is

between citizens of a state and foreign states, or subjects; but there is a proviso as to the matter in controversy, and that proviso is that the matter in controversy shall not be an assigned promissory note, or other chose in action, unless such suit might have been prosecuted in such court to recover upon such note if no assignment had been made.

Thus there is a limitation upon the jurisdiction of the federal courts. Were this not so, then the assignee clause would be meaningless and ineffective, and any national bank of a foreign state could file suit as the assignee of a chose in action in the federal courts, and the very purpose of such clause would be eliminated and, as Justice Story says in the case of United States v. Green, 4 Mason, open the door for fraud. The Federal Reserve Bank can be the agency of such fraud if its contention is upheld.

As an original proposition, the Federal Reserve Bank at Dallas had no cause of action against the defendant Sowell. It had no promissory note belonging to him. There was no suit arising under the Constitution and laws of the United States, but it acquired a right to his note by assignment and it is only by virtue of being the assignee of a note on which the National Bank of Cleburne could not sue in the federal court that it comes in and says that

it presents a question arising under the Constitution and laws of the United States, and thereby the federal courts have jurisdiction over a promissory note payable by one citizen of a state to another citizen of the same state.

In the case of Kolze v. Hoadley, 200 U. S., page 76, the Supreme Court lays down the rule very broadly that the language of the Act of 1888 is clear and unambiguous, and that where the suit, no matter in what guise it shall be presented, is a suit to recover upon a promissory note or other chose in action by an assignee, that the District Court has no jurisdiction unless the suit might have been prosecuted in such court to recover on the note if no assignment or transfer had been made.

The Court further says that the bill or other pleading must contain an averment showing the suit could have been maintained by the assignor if no assignment had been made.

This doctrine was announced in 1893 in the case of United States National Bank v. McNair, 56 Fed., page 323.

The Supreme Court in the case of Parker v. Omsby, 141 U. S. 81, lays down the rule as follows:

> "It was settled by many decisions under the Act of 1789 that a Circuit Court of the United States had no jurisdiction of a suit brought

> against the maker by the assignee of a promissory note payable to order, unless it appear affirmatively that it could have been maintained in that court in the name of the original payee."

Counsel are not unmindful of the decision of Judge Grubbs in the case of Federal Reserve Bank of Dallas v. Webster, 287 Fed. 579, nor of the reasoning given in that case, but believe it is not supported by authority.

The case of Weyman v. Wallace, 201 U. S. 230, cited by him, does not militate against the position that is taken by counsel for the plaintiff in error here, because jurisdiction in that case existed not by virtue of the diversity of citizenship, but existed by a specific act of Congress. The Act of June 30th, 1876, Nineteenth Statute at Large, page 63, which specially provides that the individual liability of shareholders in a national bank may be enforced by creditor's bill brought by any creditor against the shareholder in any court of the United States having original jurisdiction in equity for the district in which the association may have been established. Hence that suit was brought to enforce the stockholders' liability by a creditor and, under a specific act of Congress, jurisdiction was given to the federal courts, as Justice Brewer says, "independently of the matter of diverse citizenship."

We concede that if the act had provided that the Federal Reserve Banks should have the right to sue on any cause of action brought by them in any District Court of the United States, that the assignee clause would not be applicable to such corporation; but by what legerdemain is jurisdiction conferred on a suit by a Federal Reserve Bank as an assignee when a national bank of a foreign state as an assignee cannot maintain the same character of suit? That bank is incorporated under the federal law. It is not a citizen of the state in which the maker of the note resides. The laws and Constitution of the United States are involved in its controversy because its federal charter and its powers may be brought into the litigation, and yet it has been uniformly held that the assignee clause restricted and prevented such bank from suing in a foreign state when its assignor could not sue in the federal court.

The United States Circuit Court of Appeals for the Eighth Circuit, in the case of Houck v. Bank of Brinkley, 242 Fed. 882, at page 884 says:

> "The note in suit is made by the defendants Houck to the order of themselves. Upon the back thereof they have written their names, which is an endorsement in blank, and is payable to brearer upon its negotiation by the makers."

The Court further says:

"The note in question is payable to the order of the makers thereof, and is not a liability of such makers until it is negotiated or transferred by them. The petition alleges that it was first endorsed by the defendants in blank, and delivered to the Bankers Trust Company, which afterwards and before maturity sold and delivered the same in the usual course of business to the plaintiff. The instrument in suit is made payable upon its face at the office of the Bankers Trust Company at St. Louis, Missouri. From this it appears to be a corporation or association of Missouri, which could not maintain an action thereon in the federal court against the defendants as makers who are citizens of Missouri. The instrument, therefore, only became an obligation of the makers when it was endorsed by them and put in circulation, and in this manner, under the allegations of the petition, came to the plaintiff Bank of Brinkley, and as there is no averment in the petition that the Bankers Trust Company of St. Louis could have brought suit thereon in the federal court, the petition fails to show that the United States District Court for the Eastern District of Missouri had any jurisdiction of this controversy. It follows that the suit should have been dismissed by the District Court upon its own motion, for want of jurisdiction (Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; Morris v. Gilmer, 129 U. S. 315, 325, 9 Sup. Ct. 289, 32 L. Ed. 690; Crehore v. Ohio

etc. Ry. Co, 131 U S. 240, 9 Sup Ct. 692, 33 L. Ed. 144; Swift v. Hoover, 242 U. S. 107, 37 Sup. Ct. 57, 61 L. Ed. 175).

"In New Orleans v. Quinlan, 173 U. S. 191, 193, 19 Sup. Ct. 329, 43 L. Ed. 664, the certificates sued upon were made by the defendant city, a corporation, and the Circuit Court therefore had jurisdiction because of that fact."

The Supreme Court of the United States under the Act of 1875 held that jurisdiction was vested in the federal courts in cases against the Texas-Pacific Railroad Company, which was a federal corporation.

Under the Act of January 28th, 1915, Thirty-eighth Statute at Large, page 803, it is provided:

"No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress."

The Bankers Trust Company after that act filed its bill to foreclose a mortgage against the Texas-Pacific Railroad Company in the Northern District of Texas. The lower court dismissed the case for want of jurisdiction, and it was appealed directly to the Supreme Court of the United States, and that Court, in 241 U. S. 295, held

"that the words of the Act of 1915 are direct and comprehensive, and that when read in the

> light of settled decisions it must be taken as requiring that a suit by or against a railroad company incorporated under an act of congress **be not regarded for jurisdictional purposes** as arising under the laws of the United States."

In that case the very argument which is presented in behalf of the Federal Reserve Bank was presented in behalf of jurisdiction, and it was argued that the suit was one arising under the laws of the United States, and, therefore, the Act of January 18th, 1915, which provided: "That no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress," was not controlling:

The Court, in passing upon the effect of the Act of 1915, says:

> "And so, when due regard is had for the terms of the amendatory section of 1915 and for the real basis of the jurisdiction affected, the conclusion is unavoidable that what is intended is to make the fact that a railroad company is incorporated under an act of Congress—that is to say, derives its existence, faculties and powers from such an act—an entirely negligible factor in determining whether a suit by or against the company is one arising under the laws of the United States."

How can it be said in this case that a suit on a promissory note as against the maker is one arising under the laws and Constitution of the United States when Congress has repeatedly said that the assignee of such note cannot sue thereon unless the assignor could have maintained his suit in the federal court.

Is the language of the Act of 1915 as to jurisdiction more restrictive than the language of the assignee proviso of the Act of 1888, which is now a part of Section 24 of the Judicial Code?

If jurisdiction in this case exists under Clause 1-A of Section 24 of the Judicial Code, why does not the jurisdiction exist in favor of any national bank of a foreign state which, as an assignee, sues in the federal court on a note assigned to it by a citizen of the same state as the maker? The laws of the United States are just as much in controversy as in this suit. The national bank is organized under the laws of the United States. None of the provisions of its charter or its national incorporation are taken away by the proviso of 1882 that, for jurisdictional purposes, it shall be considered as a citizen of the state in which it is domiciled. It is still a federal corporation. When it sues in a foreign state, if it has jurisdiction under that section of the Judicial Code, why can it not invoke the same jurisdiction that the Federal Reserve Bank is

claiming in the instant case? The Supreme Court of the United States and the inferior federal courts have spoken upon that subject too many times to require reply. (See cases above cited and Petrie v. Commercial National Bank, 142 U. S. 644; Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778.)

The Circuit Court of Appeals in its decision held that case of Commercial National Bank v. Simmons (6 Federal Cases 226) was an authority supporting the jurisdiction of the federal court. Jurisdiction as to that case was expressly conferred under the Fifty-ninth Section of the Act of Congress, February 25, 1863 (12 Statutes at Large, page 681), which provides:

> "All suits, actions and proceedings by or against any association (national bank), under the act, may be had in any circuit, district or territorial court of the United States, held within the district where such association was established."

Hence, as this Court can readily see, jurisdiction was expressly conferred by the Act of Congress upon the federal court. That jurisdiction, however, was subsequently taken away by the Amendment of 1882, and it does not today exist.

In the case of United States v. Planters' Bank (9th Wheaton 904) jurisdiction was expressly con-

ferred upon the federal courts by the Act of Congress under which said bank was organized, and that Act of Congress, giving express jurisdiction in such cases, superseded the general Act of 1789 as to the assignee clause.

The Federal Reserve Act (38th Statutes at Large, page 251), Section 4, provides:

> "It (a federal reserve bank) shall have the power to sue and be sued, complain and defend in any court of law or equity."

This power does not confer jurisdiction on the federal court of suits by or against that bank, but leaves Section 24 of the Judicial Code in full force and effect as to all of its provisions; and for jurisdictional purposes, it cannot invoke its federal charter in violation of the assignee clause. The Judicial Code when adopted expressly provided:

> "The provisions of this code, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

Hence, it is made clear that Congress intended that Section 24 of the Judicial Code should be con-

strued exactly as the Act of 1875 and Amendments thereto. This Court, after the passage of the Act of 1882, expressly held, in case of Leather Manufacturers' National Bank v. Cooper (120 U. S. 717), that a national bank could not claim jurisdiction in federal court in reference to an assigned cause of action because of the source of its incorporation, under the Act of Congress of March 3, 1875, which gave jurisdiction to the federal courts of cases arising under the Constitution and Laws of the United States.

Second and Third Errors Urged Will Be Presented Together.

() Under the Negotiable Instruments Law, where a note is payable at a bank it is the duty of the holder to present same at the bank in due course of business for payment.

(3) Where the holder of a negotiable note, payable at a bank which is, under the Negotiable Instruments Act, authorized to charge the note to the account of the maker, knows of the impairment of the financial condition of such bank, the holder is negligent in failing to notify the maker that his note is not paid, or to present the note to the maker for payment. If the maker be damaged on account of the negligence of such holder, he is relieved from liability thereby.

The uniform Negotiable Instruments Act was adopted by the State of Texas by an act of the

thirty-sixth Legislature, at its regular session, chapter 123, page 190.

Section 70 provides:

> "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

Section 73 provides:

> "Presentment for payment is made at the proper place: 1. Where a place of payment is specified in the instrument and it is there presented."

Section 74 provides:

> "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

Section 75 provides:

> "Where the instrument is payable at a bank, presentment for payment must be made during banking hours unless the person to make payment has not funds there to meet it at any time

during the day, in which case presentment at any hour before the bank is closed on that day is sufficient."

Section 87 provides:

"Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

It will thus be seen under the Negotiable Instruments Act, under section 70, that presentment for payment is not necessary in order to charge the person primarily liable on the instrument, but if it is payable at a special place and the maker is able and willing to pay it there at maturity, that same constitutes a tender upon his part. Further, by section 75, that where the instrument is payable at a bank presentment for payment must be made during the banking hours, provided the maker has sufficient funds to pay it there.

Further, that where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same to the account of the principal debtor thereon.

The Federal Reserve Bank at Dallas was chargeable with knowledge of the law, and was also chargeable with the knowledge that it was its duty to pre-

sent the note for payment at the National Bank of Cleburne, and that if the maker had sufficient funds therefor that such note was a check on that bank.

The evidence in this case on that point, as shown by record, is as follows:

Mr. B. A. McKinney, governor of the Federal Reserve Bank at Dallas, testified in substance, as shown by pages 14 to 24 of the transcript of the record, as follows:

That he was governor of the Federal Reserve Bank of Dallas; was acquainted with the transactions between that bank and the National Bank of Cleburne. That the note in question was tendered to the Federal Reserve Bank on the 7th day of April, 1921, and accepted the following day as collateral security for the indebtedness of the National Bank of Cleburne.

That he was a director in the Federal Reserve Bank of Dallas in 1921, and acted as governor from the 8th day of August, 1921, to the latter part of September, 1921. That as a member of the executive committee he had obtained information as to the National Bank of Cleburne and its affairs before acting as governor of the Federal Reserve Bank. That it was the custom of the Federal Reserve Bank, and that he thought it the proper thing, where the Bank had paper held as security, to send that paper out by a messenger for collection rather

than to send it to the endorser bank for collection. That about the 11th day of August, 1921, he began sending the collateral paper held by the Federal Reserve Bank by Mr. Gentry as messenger of the Federal Reserve Bank to the National Bank of Cleburne for collection. That he knew that the National Bank of Cleburne was heavily indebted to the Federal Reserve Bank, and that he felt it was a matter of business prudence to send paper down by way of messenger rather than to send the paper by mail and trust the National Bank of Cleburne to collect it. That after he began sending Gentry down for the collection of the paper that he instructed Gentry to take a statement of the general ledger balance of the Cleburne Bank from day to day in order to show that bank's condition; and that he was endeavoring to keep up with the affairs of the Cleburne Bank and knew that it was heavily involved.

Wm. E. Abbas, the teller of the National Bank of Cleburne from the spring of 1921 up to the time the bank closed, testified in substance, as shown on transcript of the record pages 24 to 33, inclusive:

That the cash on hand on the 7th of July was $42,-267.21; that on August 11th, 1921, it was $39,182.41; on the 15th of September, $113,770.28, and on the 15th of October $57,885.18.

That practically all of the time between the 7th of July, 1921, and the 15th of October, 1921, that

the bank had sufficient cash to have paid the check or note of Mr. Sowell of $3,056.25.

That he knew Mr. W. D. Gentry, the agent of the Federal Reserve Bank. That he knew that Mr. Gentry was connected with the Federal Reserve Bank. That Mr. Gentry did not present any of his items for collection from the National Bank of Cleburne to the Federal Reserve Bank of Dallas to Mr. Abbas for payment.

He further testified that the balance of the D. S. Sowell Grain Company with the National Bank of Cleburne on July 6th, 1921, was $10,784.19. That on August 1st it was $7,935.18; on August 15th, $5,463.65; on September 1st, $2,382.02; on October 1st, $3,696.50; on October 10th, $2,593.35; and on October 13th, $3,573.60.

That he was connected with A. P. Woolridge, Receiver of the National Bank of Cleburne, and from his connection with him he thought that a dividend of possibly 15 per cent would be paid the creditors of the bank.

Mr. W. D. Gentry testified in substance, as shown on record pages 33 to 41, inclusive:

That in the months of August, September and October he was connected with the Federal Reserve Bank at Dallas.

That during the month of August that he was making special daily visits to Cleburne. That the

object of his visits was to make collection of checks and notes held by the Federal Reserve Bank on the National Bank of Cleburne. That he would take with him on his visits all the notes that were past due and all the notes that were maturing within the next few days. That when he took such notes down there he would present them to the bank for payment; keep them in his possession, and deliver them as payments were made. That he presented his notes for payment to Sid Norwood, the president of the bank. That he did not take up the payment of notes with any other officer of the bank. That Mr. Norwood did not tell him why the Sowell note was not paid. That he did not tell him that Mr. Sowell did not have on deposit in the bank an amount in excess of the note. That the bank at Cleburne had endorsed the Sowell note. That the note was past due. That the National Bank of Cleburne did not pay him. That he gave no notice to Mr. Sowell of the dishonor of his paper by the bank, and no notice was sent by the Federal Reserve Bank to him that he knew of.

That when he went to Cleburne on his trips that he would stay all day. That it would only take him a few minutes to check up the notes that were due on that day with the bank. That he stayed in the bank the balance of the day. That he did not ever look up Mr. Sowell's account. That he did not see

that Mr. Sowell had in excess of a sum sufficient to pay his note. That he continued going down to the National Bank of Cleburne daily or almost daily until the 17th day of October, 1921. That the Sowell note was past due when he started going down there. That under his instruction not to leave the note with the bank that he did not leave it. That he did not present the note to Mr. Sowell or the Sowell Grain Company; nor did he call Mr. Sowell up. That he knew that the Cleburne Bank was in a shaky condition, and knew that it was having difficulty in paying checks that were received from other banks. That he knew the Federal Reserve Bank would not trust them with collateral notes, which it held, and for that reason they sent him, Mr. Gentry, down there, and that the Federal Reserve Bank would not even send a check to be collected through the National Bank of Cleburne. That he did not take up with any individual, whose notes he had, the payment of such notes.

He further testified that the note of the Sowell Grain Company was a note of the class that the Federal Reserve Bank was authorized to accept as collateral. That the Federal Reserve Bank as to the D. S. Sowell Grain Company had whatever information that the National Bank of Cleburne furnished. That they had Dun's and Bradstreet's rating, and had a financial statement of the Sowell Grain Com-

pany. That he asked the bank at Cleburne to show them their general ledger. That they very readily consented, and that he took a transcript of it. That he did not ask to see the Sowell account, or how it stood. That he made no request to see the respective makers of the notes. That he did not find out whether the makers had sufficient money, so that the National Bank of Cleburne could charge their notes to the respective accounts, and that he did not make any investigation of any of the notes, and did not make any such request of the National Bank of Cleburne while he was there.

It was agreed that D. D. McLarty, assistant cashier of the bank, would testify (Tr. of the Rec., p. 42), that about the 10th day of July, 1921, that Mr. Sowell called at the National Bank of Cleburne to pay his note. That he asked Mr. McLarty for the note and that Mr. McLarty told him that it was not there, but that they would get it for Mr. Sowell and he instructed the bank to charge the note to his account.

Mr. D. S. Sowell, the defendant, testified (Tr., pp. 42 to 47, inclusive) that he as an individual was engaged in the grain business in Cleburne under the name of D. S. Sowell Grain Company. That the note for $3,056.25 sued on included $56.25 interest, and that the principal of the note was $3,000.00.

He further testified that he had been doing business with the National Bank of Cleburne for about fifteen years. That the note in suit was never presented to him for payment prior to the time that the National Bank of Cleburne was closed by the Comptroller. That he was away from Cleburne most of the time from the last of May until about the first of September, but from the first of September on he was there continuously. That he did not know about the condition of the National Bank of Cleburne prior to the 17th day of October. That in his conversation with Mr. McLarty relative to his note that he was not advised where the note was or who held it. That he was ready, willing and able to pay the note up to the time the bank failed on the 17th day of October, 1921.

John T. Jordan, assistant cashier of the National Bank of Cleburne during the year 1921, testified in substance, record pages 47 to 51, inclusive, as follows:

That he was assistant cashier of the National Bank of Cleburne. That he knew W. G. Gentry. That he was there almost daily during the time the bank was open after the 21st day of August, 1921. That Mr. Gentry never presented the note of the D. S. Sowell Grain Company, which was payable at the National Bank of Cleburne, to him for payment. That he never saw the note in possession of Mr. Gentry. That Mr. Gentry was accorded the privilege of com-

ing in and examining the general ledger of the bank. That he did not know that Mr. Gentry looked at it every day. That he could have looked at the individual ledger if he had asked to.

That Mr. Deats, Mr. Sowell's manager, called at the bank relative to the note of $3,056.25, and that he made mention to Mr. Norwood that he was ready to pay the note. That Mr. Sowell's balance with the bank was reflected by the individual ledger showing his account.

The above evidence disclosed that Mr. Sowell had on hand practically at all times from the maturity of the note up to the day the bank closed sufficient funds to have paid the note in full. The day the bank closed it appeared that Mr. Sowell had given a check for $1,000.00, which was charged against his balance of $3,248.00, and that this check was deposited within a few hours of the bank's closing, so that his balance was reduced, so far as the books showed, to $2,248.00 at the close of business on the 17th day of October, which was Monday. The evidence further shows that Mr. Sowell was at all times ready, able and willing to pay the note and had sufficient funds with which to do so. The evidence further shows beyond controversy that the National Bank at Cleburne was in a shaky condition and was having some difficulty in taking care of its checks. Likewise the Federal Reserve Bank knew

the amount of cash that the National Bank of Cleburne had at the close of business each day. This was obtained from the general ledger.

The Federal Reserve Bank at Dallas likewise knew that D. S. Sowell Grain Company was a customer of the National Bank of Cleburne, and it likewise knew that the National Bank of Cleburne was authorized to charge Sowell's note against his account, and that bank had the right of access to the accounts of the customers of the bank. They knew that the note was due on the 6th day of July, 1921. The note was not presented to the teller of the bank to whom checks were presented for payment, and not presented to the assistant cashier of the bank, who was at the teller's window part of the time, or presented for payment as checks were presented, but that request was made of the president for its payment. The president did not say that Sowell did not have sufficient funds in the bank with which to pay the note. That the only thing so far as the runner who had the note can now say about it was that the note was not paid. The runner of the bank further testified that he was taking those notes down to the bank at Cleburne daily and waiting for money to come in and pay those notes.

Was this not in effect making the Cleburne Bank the agent for the collection of the notes? It is true that the note was not delivered to the Cleburne Bank

until the money was collected by it; but who was collecting the money? Mr. Gentry was not collecting it from the man who made the note. He made the Cleburne Bank collect it. Now, if he made the Cleburne Bank collect it, did he not make the Cleburne Bank the agent for such collection, and did he not, by allowing them to collect money from the maker of the note for his benefit, make the bank the agent of the Federal Reserve Bank? Further, the Federal Reserve Bank knew the condition of the Cleburne Bank and sent its agent to collect the Sowell note. Was it not his duty to present the note to the maker for payment?

Under the Negotiable Instruments Act a note payable at a banking house is upon maturity of the note equivalent to a check upon that bank. There is no reason why the maker should not be released from liability if, through the negligence of the holder to present the note, he has been damaged.

The Court of Appeals of New York held this in the case of Baldwin's Bank v. Smith, 215 N. Y. 76.

The Supreme Court of Massachusetts, in the case of Nineteenth Ward Bank v. First National Bank, 184 Mass. 49, held to the same effect. Likewise in the case of Belk v. Capital Fire Insurance Company, 100 Nebr. 260.

In the case of New England National Bank v. Dick, 84 Kans. 252, the Court, while not directly deciding the point, says:

> "That if the holder of a note payable at a bank fails to present it at the bank at maturity, and the bank fails, the maker will be wholly discharged."

The United States Circuit Court of Appeals for the First Circuit, in the case of Carpenter v. National Shawmut Bank, 187 Fed. 1, at page 5 says:

> "If the note had been particularly addressed to the Shawmut Bank, and it had had the money on deposit belonging to the promisor and would thus have been particularly requested by the promisor to pay the notes, its plain duty on their presentation for payment would have been violated if it had refused to pay when it had the funds to do so."

The Negotiable Instruments Act was in force in Massachusetts, and section 104 of such act, as quoted on page 4 of the above case cited, is identical with section 87 of the act as adopted by Texas.

Now, in the instant case the Federal Reserve Bank, on the 6th day of July, 1921, had the note in question, which was, in effect, a check on the National Bank of Cleburne, drawn by the D. S. Sowell Grain Company. Sowell had ample funds in the bank to

have paid that note, and as a matter of fact had instructed the bank to charge it to his account. The Federal Reserve Bank having a check on that bank, it was its duty to have presented that check during banking house at the teller's window for payment, and the bank having sufficient funds belonging to Sowell, under the evidence, same would have been paid; but, according to the undisputed evidence, the runner for the bank takes Mr. Sowell's note down and requests the president of the bank to pay it. The president does not pay it; does not say that there are not sufficient funds on hand, and gives no excuse for nonpayment, but simply doesn't pay the note. No inquiry is made as to Sowell's whereabouts. No effort is made to advise him that his note, equivalent to a check, has been dishonored by the bank which should have paid it. The Federal Reserve Bank knew that the National Bank of Cleburne was in a shaky condition; Sowell did not, and yet the Federal Reserve Bank does nothing toward the enforcing of payment of that note or check from the Cleburne Bank, and does nothing toward protecting the interest of Sowell when it knew that its negligence would affect him to the full amount of the note, because it was upon notice of the condition of the National Bank of Cleburne, and knew that the bank was in danger of having its doors closed when Sowell did not.

The loss to Sowell of the amount of his deposit

was due primarily and solely to the negligence of the Federal Reserve Bank of Dallas, and that bank was responsible for that loss, and we cannot imagine a stronger case of a loss suffered by reason of the negligence of a bank than the instant case.

The Supreme Court of Texas, since the adoption of the "Negotiable Instruments Act," has not construed section 87, but it has been the settled law of Texas that a check on a bank should be promptly presented and if a loss should fall upon the drawer of the check by the negligence of the holder in presenting it the drawer of the check is released from liability (Merchants National Bank of Houston v. Dorchester, 136 S. W. 551; Lewis v. Commercial National Bank, 83 S. W. 423; Commercial State Bk. v. Harkrider, 250 S. W. 1069).

In the instant case there is some question in counsel's mind as to the amount of loss suffered by the plaintiff in error Sowell. Under the undisputed evidence he had $3,248.00 to his credit on the day that the bank failed. On that day he gave a check for $1,000 to the Cleburne Oil Company. This check was not presented to the bank or deposited by the Cleburne Oil Company until a few minutes before the bank was taken charge of by the Comptroller. The check was turned back to the Oil Company and Mr. Sowell had to pay that company the $1,000 represented thereby, so that his actual loss is $3,248.00, which was more than sufficient to pay the face of

the note and interest held by the Federal Reserve Bank. The attorney's fees not having accrued at that time certainly could not have been collectable.

If, on the other hand, the Court should hold that Sowell's balance was $2,248.00 at the time of the failure of the bank, then he was damaged by the negligence of the Federal Reserve Bank to the extent of $2,248.00, and same should have been applied as against the debt sued on herein, as of date October 17th, and a judgment only for the balance rendered; but it occurs to counsel that Sowell's loss as shown by the record in this case was the whole amount of his deposit, $3,248.00.

"It is a cardinal maxim that no one shall be allowed in a court of justice to take advantage of his own wrong," per Matthews, J., in Gumteel v. Pitkin, 124 U. S. 147. This maxim appears to counsel to be one that should be enforced in this case.

The Circuit Court of Appeals held that as the note contained a provision that the maker waived protest, notice thereof and diligence in collecting, that the plaintiff bank was relieved from attempting to collect the note of the maker or presenting it to the Cleburne Bank for payment. This might ordinarily be true, but where one in superior position, as a Federal Reserve Bank, knew that it was by its negligence damaging the maker by positive act, and knew that the Cleburne Bank was on the verge of failure, then a duty arose in behalf of the Federal Reserve

Bank, and that was to notify Sowell his note was unpaid, or to have the Cleburne Bank pay the note out of his deposit. Where one by its gross negligence willfully inflicts an injury upon another, then it certainly creates a liability for the injury inflicted, and the measure of damages is definite, certain and fixed, and in instant case was the amount of the note sued on.

Fourth Error. Where a note is held as collateral security and the holder of such note has sufficient collateral to pay its debt, and the maker of the note has a good defense as against the payee, the holder is required to exhause its other collateral first, before enforcing collection from the maker.

The defendant pleaded (Rec., p. 8) that "the plaintiff holds defendant's note as collateral security, and that it holds adequate security outside of said note for the payment of said indebtedness of said bank to it, and that, under the facts and circumstances alleged, it would be inequitable and unjust for the plaintiff to enforce the collection of the note sued on herein, but it should be required first to exhaust its other collateral before enforcing the collection of this note, as the National Bank of Cleburne is an insolvent institution and this defendant cannot reimburse himself out of said bank for the loss that he will suffer herein, and for that reason the suit should be stayed until the plaintiff has exhausted its securities, or until its debts have been paid."

The Court sustained a special exception to such paragraph of the petition. (See Special Exception Three, Rec., p. 10, and judgment of the Court sustaining the exception on record page 12.)

Under the ruling of the Court evidence was not permitted as to the amount of collateral that the Federal Reserve Bank held for its debt, and there was no evidence that it did not have sufficient collateral to fully pay its debt outside of the plaintiff's note.

The law is well settled that while it protects the innocent holder of negotiable paper, it does not permit him to use his vantage ground and will not allow him to recover further than is necessary for his complete protection, and cannot be extended so as to allow said holder to pervert the equitable principles upon which it is based for the purpose of aiding one party to a commercial instrument in obtaining an advantage over another.

Van Winkle Gin Co. v. Citizens Bank, 89 Tex. 147, loc. cit. 153 to 155;
Second National Bank v. McGhee, 241 S. W. 287;
Simmons v. Hodges, 250 Fed. 424, loc. cit. 426-427.

The doctrine which the Circuit Court of Appeals announced in this case would be most inequitable and unjust. Even though it have ample security to pay its

debt it is permitted under the ruling of the Court to collect from petitioner Sowell and make him pay his note when to do so deprives him of his deposit in the bank, and permits him to receive ten to fifteen per cent of such deposit, when the Federal Reserve Bank might collect its debt in full without causing him any loss whatever, and we think the trial court should have at least required the Federal Reserve Bank to have shown that it had made an effort to collect its collateral, had failed to do so, or that the persons who owed such collateral were not solvent, or that its collateral was insufficient to pay its debt. But this evidence was not permitted under the ruling of the Court and the defense was denied to Mr. Sowell.

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals was in error in its decision and that the District Court likewise erred in its determination of this cause. And the plaintiff in error respectfully asks this Court to reverse this cause and order same dismissed or that it be reversed and sent back to the Court with proper instructions.

Respectfully submitted,

Counsel for Plaintiff in Error.

APR 23 1925
WM. R. STANSBURY

No. 367.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

D. S. SOWELL, Plaintiff in Error,

versus

FEDERAL RESERVE BANK OF DALLAS,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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Defendant in Error.

In error to the United States Circuit
Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Defendant in error acquiesces in the statement of the case made by plaintiff in error, with a further statement that the note sued on provided for the payment of a ten per cent attorney's fee in the event of suit on it.

ARGUMENT FOR DEFENDANT IN ERROR.

POINT ONE.

The jurisdiction of the trial court clearly appears.

The sole objection to the jurisdiction is founded on the limitation imposed by the following words now appearing in the first paragraph of section 24 of the judicial code:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

By its legislative and judicial history the assignee clause is linked inextricably to citizenship or alienage; that is, it is a limitation only upon those suits where the jurisdiction rests upon the fact that a diversity of citizenship or the alienage of one of the parties exists. Since in this case neither diversity of citizenship nor alienage of a party conferred jurisdiction on the trial court, the assignee clause has no application.

In the beginning the original jurisdiction of the circuit court, established by the judiciary act of 1789, (1 Statutes at Large, 78) which was the equivalent of the present district court, was conferred by section 11 of said act, reading as follows:

> "And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the

courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided."

The civil jurisdiction created by section 11 was confined to actions (1) by the United States, (2) in which an alien was a party, and (3) where the suit was between citizens of different states. As we shall show, the assignee clause was held not to limit an action by the United States because not applicable thereto as falling without the evil in legislative contemplation, and there-

fore beyond the spirit of the limitation. With the United States removed from the restraints of the assignee clause, the only rights to which it applied were those pertaining to suits where an alien was a party and those in which a citizen of one state sued a citizen of another state. Thus in its birth and by the nature of the evil which it sought to prevent, the assignee clause was restrained of the broad scope which literally its expression might have indicated and was confined in its operation to a narrower field. While an enlarged jurisdiction has since been conferred on the national trial courts, no extension beyond its original limited field of operation has accrued to the assignee clause.

When this suit was brought the district court of the United States possessed ample power to entertain it through a jurisdiction that rested neither on diversity of citizenship nor alienage of a party.

The incorporation of the defendant in error was under the laws of the United States, and the action brought by it was a suit arising under the laws of the United States. American Bank & Trust Co. v. Federal Bank, 256 U. S. 356. When a plaintiff chartered by the United States brings an action in the federal court, the suit is one arising under the laws of the United States. Unless by some appropriate statute, the right of such plaintiff to sue in the federal court, where the sole ground of jurisdiction is that the suit arises under a law of the United States, is stricken the plaintiff can maintain the action, but it cannot maintain it when the right to sue in the federal court because of the federal charter has been taken away by a statutory provision applicable to such plaintiff.

The term "national banking associations" used in the judicial code does not include the defendant in error, as this court has held in the case last cited, so that the privilege of suing because of its charter in the federal courts where the requisite amount is involved had not been taken away from the defendant in error, as by the fifth section of the act of January 28, 1915, 38 Statutes at Large, page 803, it had been from railroad companies. The section is confined to railroad companies. Since this suit arose under a law of the United States and the other statutory requisites of jurisdiction exist, if the assignee clause does not apply to suits arising under the laws of the United States, the jurisdiction of the trial court is obvious. The evil to be avoided by the eleventh section of the judiciary act was pointed out by this court more than one hundred years ago in Bank of the United States v. Planters' Bank of Georgia, 9 Wheat., l. c. 909, thus:

> "It was apprehended that bonds and notes given in the usual course of business, by citizens of the same state, to each other, might be assigned to the citizens of another state, and thus render the maker liable to a suit in the federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits brought by the citizen of one state against the citizen of another, restrains that jurisdiction, where the suit is brought by an assignee to cases where the suit might have been sustained, had no assignment been made. But the bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States." 9 Wheat., l. c. 909.

Here, as in the case last cited, the suit is not brought in virtue of any right conferred by the judiciary act of 1789, in which the limitation first occurred. The right to sue here is in virtue of the action arising under the laws of the United States. This right, except for an interval of about a year, and perhaps in some individual instances, did not exist during the period from the establishment of the courts to the passage of the act of March 30, 1875, in which it was broadly conferred, and is retained in the first clause of section 24 of the judicial code along with the second and third grounds of jurisdiction which appear in the judiciary act of 1789. The civil jurisdiction conferred by the first clause of the twenty-fourth section of the judicial code substitutes for actions by the United States the class that arise under the constitution or laws of the United States, or treaties made or which shall be made under their authority, and leaves the other two grounds of jurisdiction in the judiciary act of 1789 substantially as defined therein. It also incorporates the assignee clause in the act of 1789. Shortly after the decision in Bank of the United States v. Planters Bank of Georgia, supra, the question came up at the circuit in United States v. Green, et al., 4 Mason 427, before Justice Storey, and he held that a suit by the United States upon an assigned note was not within the evil contemplated and that it was not the intent of congress that the assignee clause should apply to such a suit. The reasoning of the distinguished justice that the clause was not applicable to the sovereign and the evil one that was not likely to be suffered at such hands, is applicable here.

The defendant in error is not a commercial bank. It was formed and functions as an agency of the sovereign in discharging the paramount duty of affording safe and

convenient facilities for the transactions of commerce, not directly to the people but to subordinate corporations which deal directly with the people. These latter corporations fall within the inhibition of the assignee clause, because their right to resort to the federal courts was placed on the basis of citizenship, and not on organization under a federal law, and this by a special statute, which does not apply to the defendant in error. In this way the intent of the assignee clause as originally enacted and since retained was preserved. Soon after the passage of the act of 1875, when jurisdiction of suits generally arising under the laws of the United States was conferred on the courts, congress took away the benefits of that act springing from their charters from the then national banks, which were and are commercial banks, by placing them jurisdictionally on the basis of citizenship, so that the assignee clause would apply to their suits. The proviso to section 4 of the act of 1882 reads as follows:

> "Provided, however, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." 22 Stat. at Large, 163.

The act of 1789 did not include as a ground of jurisdiction suits arising under the laws of the United States.

The First Bank of the United States was not clothed by its charter with power to sue in the federal courts. Therefore it was held in the cases of Bank of the United States v. Martin, 5 Peters 479, and Bank of the United States v. Deveaux, 5 Cranch. 61, that the courts were without jurisdiction of the actions. It cannot be doubted, however, that had the original judiciary act granted jurisdiction in actions arising under laws of the United States, as did the judicial code, or that had the charter of the bank given it express power to sue in the federal courts, these cases would have been decided in favor of the jurisdiction of the courts. The charter of the Second Bank of the United States expressly granted to the bank the power to sue in the federal courts. This court in Osborn v. The Bank, 9 Wheat. 738, sustained this grant of power. In Commercial National Bank v. Simmons, 6 Federal Cases, No. 3062, the bank sued to recover the contents of assigned notes and the defendant contended that the assignee clause defeated the jurisdiction, but the contention was not sustained. In Bank of the United States v. Planters Bank of Georgia, supra, this court held that the Bank of the United States could maintain an action on notes assigned to it by citizens of the state of Georgia in which the action was brought, despite the suggested application of the assignee clause. The opinion in that case shows that the court construed the assignee clause to be confined in its operation to cases in which the jurisdiction rested solely on diverse citizenship. The language of Chief Justice Marshall, dealing with the assignee clause in the opinion, applies with as great force to the exercise of jurisdiction in this cause as in the one in which the language was used.

This case arises under the laws of the United States. It was brought by a corporation organized under those laws, from which none of the privileges flowing from such an organization had been taken away as in the case of commercial banks and railroads. Judge Welker, in Commercial National Bank v. Simmons, supra, said:

> "If the matter of citizenship, in reference to the national banks, is dispensed with in favor of such banks, then what reason is there for the application of the limitation, as to suits on assigned paper? That limitation is only attached to enforce the privileges of citizenship and to prevent its abuse in bringing suits in federal courts. And, further, the banks, in purchasing notes, etc., are only doing what the law authorizes them to do." 6 Fed. Cas. 3062.

When we reflect that the restriction of the assignee clause has been applied only when linked to citizenship, and that it has never been applied to the United States or to a case arising under a law of the United States against those having the unrestricted right to sue in the federal courts because organized under the laws of the United States, we find in the suggestion of Judge Welker a potent reason why the assignee clause should not apply to the defendant in error here.

The bank in purchasing the notes sued on was doing only what the law authorized it to do. It scarcely can be supposed that congress intended in providing for the organization of federal reserve banks, one of whose duties was to afford credit to the national banks as well as to state banks affiliated with the system, taking security therefor, that they would not have the right to realize on their security through an action in the federal court. Had congress found reason to apply so harsh a rule

words declaring its purpose would have been found in the act. It is not difficult to suppose that most of the collateral security received by the Federal Reserve Bank from an embarrassed bank would be in the form of promissory notes, taken by the borrowing bank from citizens of the state in which it did business. Also it would have occurred to congress that the Federal Reserve Bank would necessarily be less inclined to loan, and less liberal in lending, when the law required the lender in case of default to resort to the local courts for the collection of collateral securities from those residing in the vicinage of the defunct borrower.

This court has recognized the distinction between the ordinary commercial national banks organized under the laws of the United States and the great system of Federal Reserve Banks also organized under those laws, and has refused to apply the test of citizenship in suits brought by Federal Reserve Banks, and thereby has relieved the Federal Reserve Banks of the limitations of the assignee clause applying only in cases of citizenship, and to commercial national banks because of their imposed citizenship. The Federal Reserve Bank system is much closer in its governmental function to the sovereign authority. Its supervision and control are more exact and intimate. The government participates in its pecuniary results, and it cannot reasonably be conceived that the assignee clause, the purpose of which was to prevent fraudulent transfers of suable choses in action, was to be applied to the Federal Reserve Banks, organized, owned, supervised and conducted as they are.

The transaction in this case clearly is not within the evil contemplated by the assignee clause, and is thus re-

moved from the spirit of the provision. This court has several times declared the mischief. Thus it said:

> "The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. Assignments by operation of law, by creating legal representatives, are not within the mischief or reason of the law." New Orleans v. Whitney, administrator, 138 U. S. 595.

> "It is quite plain that the plaintiff's action did not offend the spirit and purpose of this section of the Act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the federal court." Holmes v. Goldsmith, 147 U. S. 160.

Also, the second circuit court of appeals has said:

> "The intent of the statute was to prevent citizens of the same state from creating a diversity of citizenship by assignment, and from thereby conferring upon the assignee by indirection a right to sue in the courts of the United States which otherwise he would not have possessed." Lipschitz v. Napa Fruit Co., 223 Fed. 701.

The defendant in error, independent of the question of citizenship, had a general right to sue in the federal court. The assignment was not for the purpose of creating a diversity of citizenship; it was to create a security for a loan the Federal Reserve Bank was created to make and authorized to extend. No suggestion of fraud could have inhered in such a transaction, nor that the assignment was made for the purpose of giving jurisdiction to the federal court. If this result followed, it was simply an incident and always would be incidental in trans-

actions between the Federal Reserve Bank and the other banks affiliated with that system.

As an additional suggestion that this case is not within the evil of the assignee clause and therefore not within its spirit, we call attention to the act to amend the judicial code approved February 13, 1925, not yet in effect. This act, when effective, will apparently take away from Federal Reserve Banks the power to institute suits of this class in the federal courts. This restriction was not in aid of the assignee clause, because the amendment leaves intact the jurisdiction conferred by the first and sixteenth paragraphs of section 24 of the judicial code. Under these sections cases brought by an officer of the United States, or for winding up the affairs of any national banking association, may be brought in the federal district courts.

The record discloses that the assignor bank failed, went into the hands of a receiver and was being liquidated under the authority of the Comptroller of the Currency. Had the note remained in the hands of the bank unpaid when the receiver was appointed, the district court which tried this case would have had jurisdiction to try the controversy between the receiver and the plaintiff in error for recovery upon the chose in action which the defendant in error sued on. Gibson v. Peters, 150 U. S. 342-344. This court therein said:

> "It is provided by section 380 of the Revised Statutes of the United States, that all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

"The suit brought against McDonald was one arising out of the provisions of the act of Congress governing such associations, and the receiver in whose name it was instituted was an officer and agent of the United States within the meaning of the above section. Kennedy v. Gibson, 8 Wall. 504; Price v. Abbott, 17 Fed. Rep. 506; Frelinghuysen v. Baldwin, 12 Fed. Rep. 395; Hendee v. Connecticut, etc., Railroad, 26 Fed. Rep. 677; Pacific Bank v. Mixter, 114 U. S. 463; 150 U. S., l. c. 344; Ex parte Chitwood, 165 U. S. 457; Auten v. United States National Bank, 174 U. S. 125."

And this independently of the amount involved or the citizenship of the parties. Murray v. Chambers, 151 Fed. 142, where the holding was:

"Jurisdiction, however, is clear. A receiver of a national bank is an officer of the government within the meaning of the statutes. Gibson v. Peters, 150 U. S. 342, 14 Sup. Ct. 134, 37 L. Ed. 1104. And, in an action to recover the assets of the bank, he sues under authority of the acts of Congress and the courts of the United States are given express jurisdiction. Rev. St. section 629, cl. 3 (U. S. Comp. St. 1901, p. 503). This is also without regard to the amount involved or the citizenship of the parties. Armstrong v. Ettlesohn (C. C.) 36 Fed. 209. And it is not affected by Act of March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 503). Armstrong v. Trautman (C. C.) 36 Fed. 275; McConville v. Gilmour (C. C.) 36 Fed. 277, 1 L. R. A. 498; Guarantee Co. v. Hanway, 104 Fed. 369, 44 C. C. A. 312. This has been too many times decided to have the question raised again; and it is settled for this court, if not otherwise, by Yardley v. Dickson (C. C.) 47 Fed. 835, and Fisher v. Yoder (C. C.) 53 Fed. 565." 151 Fed., l. c. 143.

Wyman v. Wallace, 201 U. S. 230, established the jurisdiction of the trial court. The statement of the case, the briefs of counsel and the opinion of the circuit court of appeals all clearly show that the point was raised, and the briefs of counsel that it was argued. In a unanimous opinion, this court, speaking through Mr. Justice Brewer, said on this point:

> "A matter of jurisdiction is first presented. The note, which is the foundation of plaintiff's suit, is one made by the American Bank to the Union Bank, both located in Nebraska, and under the statute, for the purpose of jurisdiction, to be considered citizens of Nebraska. 25 Stat. 436; sec. 4. The plaintiff is a citizen of New Hampshire. He could not maintain an action against the maker of the note, although a citizen of a State other than that of the maker and payee. 25 Stat. 434; sec. 1. But if diverse citizenship was the sole basis of the jurisdiction of the Circuit Court, the decision of the Court of Appeals would be final and there would be no appeal to this court. 26 Stat. 828, section 6. The jurisdiction of the Circuit Court, however, was not invoked on the ground of diverse citizenship—at least, not on that alone. The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws. Section 5220, Rev. Stat., reads: 'Any (national banking) association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock.'
>
> By section 5151, Rev. Stat., stockholders in national banks are made liable for 'all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.' Section 2 of the act of June 30, 1876, 19 Stat. 63, is as follows:

'Sec. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.'

More than two-thirds of the stock voted, on February 25, 1896, for a voluntary liquidation, and on April 27, 1896, the Comptroller of the Currency formally approved the liquidation and notified the cashier of the American Bank to that effect.

In proceeding, therefore, by this suit to enforce in behalf of himself and all other creditors of the American Bank the extra liability imposed by Rev. Stat. section 5151, a case was presented arising under the laws of the United States, and of which, independently of the matter of diverse citizenship, the Circuit Court had jurisdiction.'' 201 U. S., l. c. 240.

The judgment of the circuit court of appeals for the eighth circuit, from which the appeal was taken, is reported in 68 C. C. A. 40, and affirmed the decree of the district court. Plaintiff in error attempts to distinguish this case, with the suggestion that in it jurisdiction did not exist by virtue of the diversity of citizenshp but existed by a specific act of congress. Likewise in this case jurisdiction does not exist by virtue of the diversity of citizenship, but exists by a specific act of congress now incorporated into the judicial code conferring jurisdiction

of actions arising under the laws of the United States. The action arises under a law of the United States. American Bank & Trust Co. v. Federal Bank, supra. The lower court had jurisdiction of this suit "independently of the matter of diverse citizenship."

If it were not that the commercial banks organized under the laws of the United States despite that fact have been tied to state citizenship in matters of federal court jurisdiction, such a bank could maintain a suit like this. As no such restriction has been placed on Federal Reserve Banks, the defendant in error can maintain the action, which is one arising under a law of the United States, because its charter and power arise from such a law. The one class of banks are jurisdictionally citizens of the state of their location; the other class are not restricted to the jurisdictional rights of citizens as such. The assignee clause as originally incorporated into the judiciary act of 1789, as it did not apply to suits by the United States, was confined in its field of operation to the other classes of suits of which jurisdiction was given, viz., suits between citizens of different states and where an alien was a party. The intent to make of the assignee clause an additional requirement where jurisdiction depended on diversity of citizenship or alienage is very clear. The scope of the clause has never been extended, although additional jurisdiction has been conferred on the courts. The clause appears originally as a proviso designed to restrain the operation of citizenship and alienage bases of jurisdiction from extending to cases congress intended should not be within their scope. The original office of the assignee clause has not been changed through intermediate legislation, nor by its incorporation into the judicial code. True, it is there differently ar-

ranged in a separate sentence, but this is negligible since the judicial code in sections 294 and 295 declare these rules of construction:

> "Section 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change in words in such statute, unless such change of intent shall be clearly manifest.
>
> Section 295. The arrangement and classification of the several sections of this act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed."

This court speaking of a revision said:

> "The change of arrangement, which placed portions of what was originally a single section in two separated sections, cannot be regarded as altering the scope and purpose of the statement. For it will not be inferred that Congress in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." Anderson v. Pacific Co., 225 U. S. 187.

And speaking of the judicial code later said:

> "Aside from this, it is to be, moreover, observed that the intention of Congress to make by the adoption of the Judicial Code so radical a change from the rule which had prevailed for so long a period is not to be indulged in without a clear manifestation of such purpose." Herrmann v. Edwards, 238 U. S. 107.

Again this court said:

> "Such is still the law under section 24; for, according to the statutory rule for construing the Judicial Code it may be assumed that the slight difference in language between the act of 1887 ('contents of a chose in action in favor of the assignee') and section 24 ('suits upon a chose in action in favor of an assignee') was not intended to bring about any change in the law, but merely as a continuation of the existing statute. In continuing the statute Congress also carried forward the construction that the restriction on jurisdiction applied to suits for damages for breach of contract, but did not apply to suits for a breach of duty nor for a recovery of things." Brown v. Fletcher, 235 U. S., l. c. 597.

No case can be found where the assignee clause was held to oust the jurisdiction, unless the jurisdiction of the case was founded only on diversity of citizenship. There is no such case where the jurisdiction depended upon the action arising under the laws of the United States.

The very question here before the court was considered by the district court at Dallas, where the defendant in error is located, and an able opinion delivered by District Judge Grubb is reported in 287 Fed. 579. Judge Grubb had before him only the question of jurisdiction of a suit by the defendant in error upon assigned notes, on which the assignor could not have sued in the federal court. He reviewed all of the pertinent authorities and followed this court's holding that a suit by the defendant in error is one arising under the laws of the United States, and held that the assignee clause was not applicable to such a suit. Indeed, we hardly can see how he could have held otherwise since the decision of this court wherein it said:

"A more plausible objection is that by the Judicial Code, section 24, sixteenth, except as therein excepted, national banking associations for the purposes of suits against them are to be deemed citizens of the States in which they are respectively located. But we agree with the court below that the reasons for localizing ordinary commercial banks do not apply to the Federal Reserve Banks created after the Judicial Code was enacted and that the phrase 'national banking associations' does not reach forward and include them. That phrase is used to describe the ordinary commercial banks whereas the others are systematically called 'Federal Reserve Banks.' We see no sufficient ground for supposing that Congress meant to open the questions that the other construction would raise." American Bank & Trust Co. v. Federal Bank, supra.

As the note was for $3,000 of principal and provided for the payment of an attorney's fee of ten per cent in case of suit, the amount involved exclusive of interest and costs exceeded $3,000 and amounted to at least $3,300. Springstead v. Crawfordsville Bank, 231 U. S. 541. This court there said:

"This is a direct writ of error to determine a question of jurisdiction. The action arose prior to the adoption of the Judicial Code and was on two promissory notes, each for one thousand dollars and each providing for the payment of a reasonable attorney's fee if suit were brought. Could such an attorney's fee be considered in determining whether the jurisdictional amount was involved? We think so. Clearly such a fee was no part of the costs, nor was it interest. It may be that the agreement to pay an attorney's fee in the event of suit created only an accessory right (though under Brown v. Webster,

156 U. S. 328, this is doubtful), but nevertheless it gave a right to recover and created a legal obligation to pay. It is true its effectiveness was dependent upon suit being brought, yet the moment suit was brought the liability to pay the fee became a 'matter in controversy' and as such to be computed in making up the requisite jurisdictional amount, Brown v. Webster, 156 U. S. 328, and this has been the rule since applied by lower Federal courts. Rogers v. Riley, 80 Fed. Rep. 759; Casualty Company v. Spradlin, 170 Fed. Rep. 322; Howard v. Carroll, 195 Fed. Rep. 646." 231 U. S., l. c. 541.

POINT II.

The maker of the note sued upon having expressly contracted to waive protest, notice thereof, and diligence in collection, cannot complain that the holder of the note at maturity failed to present the note for payment or give notice of dishonor.

AUTHORITIES

Daniel on Negotiable Instruments, 6th Ed., Vol 2, page 1246, sec. 1092;

Daniel on Negotiable Instruments, 6th Ed., Vol 2, page 1244, Sec. 1090;

8 Corpus Juris, 701, Sec. 984;

Pugh vs McCormick, 14 Wall., 361;

Reynolds vs Douglass, 12 Pet., 497;

Thornton vs Wynn, 12 Wheat., 183;

Yearger vs Farwell, 13 Wall., 8;

Union Bank vs Hyde, 6 Wheat., 572;

Archenhold Co. vs Smith, 218 S. W., 808.

ARGUMENT

Through inadvertence, a verbatim copy of the note was not placed in the record, but by agreement of counsel it has been inserted on pages 7 and 8 of the brief filed by plaintiff in error. The note contained a waiver of protest, notice thereof, and diligence in collection. This is evident from the record, as paragraph 2 of plaintiff's original petition is as follows:

> "That heretofore, to-wit, the 6th day of April, 1921, the defendant executed and delivered his certain promissory note dated on the day and year aforesaid in the principal sum of Three Thousand Fifty-six and Twenty-five Hundredths ($3,056.25) Dollars, said note maturing on the 6th day of July, 1921, payable to the National Bank of Cleburne, at its banking house in Cleburne, Texas; that said note provides for interest at the rate of ten (10%) per cent per annum from maturity until paid, and provides for an additional amount of ten (10%) per cent of the amount due for attorney's fees if placed in the hands of an attorney for collection after maturity, and providing further that the maker waive protest, notice thereof and diligence in collection, said note being signed 'D. S. Sowell Grain Co., by A. B. Deat, Mgr.' " (Tr. 2)

Defendant's bill of exceptions shows the following:

> "Mr. Stroud: We offer in evidence the note set forth in the petition, being note No. 1483, dated Cleburne, Texas, April 6, 1921, for the sum of $3,056.25, due July 6, 1921, payable to the National Bank of Cleburne, Cleburne, Texas, with interest at the rate of ten per cent per annum from maturity, providing for attorney's fees, etc., and signed by D. S. Sowell." (Tr. 13-14)

While the note sued upon is not fully set forth in the bill of exceptions, the portion hereinabove quoted specifically refers to the note described in the original petition of defendant in error, and the description there given of the note in question shows that it provided, further, that "the maker waived protest, notice thereof, and diligence in collection." The bill of exceptions (Tr. pp. 13-56 inc.) shows on its face to be a transcript of the testimony and other proceedings had on the trial of the cause in the trial court, and shows clearly that there was no objection made that the note referred to and offered in evidence varied from the allegations in respect thereto as contained in said original petition, and although the note itself is not copied into the record, we think the citations from the transcript hereinabove made are amply sufficient to show the waiver referred to under this point. For the convenience of the court, and to remove any doubt as to the contents of the note, a copy thereof has been, by agreement, incorporated and set forth in the brief of plaintiff in error at pages heretofore indicated.

The plaintiff in error, in his second and third Specifications of Error, raises the issue of whether or not it is necessary for the holder of a note to present the same for payment at maturity, and to give notice of dishonor, in order to charge the maker thereof. While we think the proposition urged by plaintiff in error fundamentally unsound because of the fact that it is not necessary to present an instrument nor to give notice of dishonor thereon in order to charge the party primarily liable, as will be shown in the next succeeding point, the Circuit Court of Appeals very properly disposed of these two Specifications of Error without going into the question of presentment and notice of dishonor, due to the fact

that the note contained a waiver of protest, notice thereof, and diligence in collection.

In considering this point, there should be kept clearly in mind the distinction between the presentment for payment and notice of dishonor, as well as the duty resting on the holder of an instrument to present the same for payment and to give notice of dishonor, and the effect of failure so to do.

Section 82 of Article 6001-a, Revised Statutes of Texas, provides:

> "Presentment for payment is dispensed with; * * * 3. By waiver of presentment expressed or implied."

Section 111 of Article 6001-a, Revised Statutes of Texas, provides:

> "A waiver of protest, whether in case of a foreign bill of exchange or other negotibale instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor."

Section 109 of Article 6001-a, Revised Statutes of Texas, provides:

> "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."

Section 110 of Article 6001-a, Revised Statutes of Texas, provides:

> "Where the waiver is embodied in the instrument itself, it is binding upon all parties, but where it is written above the signature of an endorser, it binds him only."

The waiver of protest, by express statutory enactment, includes waiver of presentment and also notice of dishonor. The authorities are voluminous, and as far as we have been able to find, unanimous, to the effect that where a party to a negotiable instrument has waived presentment and notice of dishonor, the holder of such instrument is under no duty to make presentment or give notice of dishonor, in order to charge him on the instrument. This proposition in general is summarized by Mr. Daniel in his work on Negotiable Instruments, 6th Ed., Vol. 2, page 1244, Sec. 1090, as follows:

> "When presentment of the bill or note at maturity has been dispensed with by a prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be a fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and as prompt presentment is a requirement solely for the benefit of the drawer and indorsers, they are themselves the sole judges to determine whether or not they will enforce it."

In the case of Reynolds vs Douglass, supra, this court says:

> "A party to a note entitled to notice, may waive it by a promise to see it paid; or acknowledgment that it must be paid; or a promise that 'he will set the matter to rights;' or by a qualified promise, having knowledge of the laches of the holder."

And again, in Thornton vs Wynn, supra:

> "It is now well settled as a principle of the law merchant, that an unconditional promise by the drawer or endorser of a bill, to pay it, after full knowledge of all the circumstances necessary to appraise him of

his discharge from his responsibility by the laches of the holder, amounts to an implied waiver of due notice of a demand of the drawer or acceptor, and dispenses with the necessity of proving it."

And to the same effect are the other cases hereinabove cited.

It follows, therefore, that both by statutory enactment and by the rules of the law merchant, that the plaintiff in error, having executed a negotiable instrument containing an express waiver of protest, notice of dishonor, and diligence in connection, cannot complain that he has been injured by a failure on the part of the holder to do the very things which he expressly relieved the holder from doing. We submit that the above and foregoing disposes of the second and third Specifications of Error relied on by the plaintiff in error herein.

POINT III.

Presentment for payment and notice of dishonor are not necessary to charge the maker of a promissory note, and no duty having been breached by failure to present the note for payment or to give notice of non-payment, the maker has no ground for complaint.

AUTHORITIES

Revised Statutes of Texas, Article 6001-a, Section 70;
Revised Statutes of Texas, Article 6001-a, Section 89;
Binghampton Pharmacy, et al vs First National Bank, 176 S. W. 1038;
Adams vs Hackensack Improvement Com., 44 N. J. L. 638;
Wood vs Merchants Savings Company, 41 Ill., 267;
Ward vs Smith, 7 Wall., 447;
Williamsport Gas Co. vs Pinkerton, 95 Pa., 62.

The Negotiable Instruments Act, adopted in Texas by the Thirty-sixth Legislature, in chapter 123, page 190, section 70, provides:

> "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

If there is no duty to present an instrument for payment, it necessarily follows that there would be no duty to give notice of dishonor, for the obvious reason that notice of dishonor follows presentment for payment. Section 70 of the Negotiable Instruments Act expressly provides that it is not necessary to present an instrument in order to charge the party primarily liable for its payment, and, as a consequence, the maker of a promissory note is not discharged from liability on account of failure to present such note, the maker being primarily liable thereon. If it is not necessary to present the instrument in order to charge the maker, it follows as a natural consequence that it is not necessary to give notice of dishonor. The question as to whom notice of dishonor must be given has, however, been expressly defined. Section 89 of the Negotiable Instruments Act provides in unequivocal terms that notice of dishonor is required to be given only to the drawer or endorser of an instrument. The language of this article is plain and admits of no other construction. There is no provision in the Negotiable Instruments Act intimating that the maker of a note is entitled to notice of dishonor.

Plaintiff in error in his brief seeks to have this court hold that Section 87 of the Negotiable Instruments Act, which provides:

> "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon,"

has the effect of converting a promissory note payable at a bank into a check drawn by the maker of the note on a bank. We do not think that such an effect can be given by a proper construction of this Act. We believe that a close study of the history of this article will disclose beyond doubt that the purpose thereof was solely for the protection of banks; that it was placed in the Negotiable Instruments Act to settle the question of whether or not a bank had the right, without specific authority from its depositor, to pay an instrument which on its face was payable at that particular bank. Prior to the insertion of this article in the Negotiable Instruments Act, the courts of this country were at variance on the authority of a bank to make payment, without specific authority, on such an instrument. We think that this is manifest from the use of the language employed, as the article in question says that an instrument made payable at a bank "is equivalent to an order **to** the bank to pay" and not an order **on** the bank to pay.

While some of the authorities cited by plaintiff in error contain dicta to the effect that Section 87 above referred to has the effect of making a note payable at a bank equivalent to a check on the bank, still a careful analysis of those cases will show that this question was not directly considered by any of the courts in the cases cited by plaintiff in error, and these authorities cannot be taken to establish such a construction.

The cases cited by plaintiff in error fall generally into two classes, the first class dealing with the effect of the failure of the holder of a check to present the same for payment promptly; the second, on the question of payment; that is, whether or not the instruments involved were paid to the holder or his duly authorized agent.

We agree that in the absence of a waiver, it is necessary to present a check for payment within a reasonable time, and in the event of non-payment, to give the drawers and endorsers notice of dishonor in order to charge them thereon. However were the instrument involved in this case unquestionably a check, presentment or notice of dishonor would not be necessary due to the express waiver contained in the instrument. The issues presented to this court by Specifications of Error 2 and 3, however, do not relate to the duties of the holder of a check with reference to presentment and notice of dishonor, but relate to the duties of the holder of a promissory note with reference to the maker in these respects. The provisions of Section 87 of the Negotiable Instruments Act have been directly considered and passed upon several times by the courts of this country. In the case of Binghampton vs First National Bank, supra, facts almost identical to those involved here were presented to the court and directly passed upon. The maker of a note, payable at a particular bank, claimed to be discharged because the holder had not presented the note for payment at its maturity, and the same provisions of the Negotiable Instruments Act as relied upon by plaintiff in error were presented to and considered by the court. The reasoning of the court is clear and, we think, sound. In his con-

clusions, Judge Green, who delivered the opinion of the court, says:

> "Presentment for payment is not necessary to charge the maker of a note. No duty to one primarily liable on a note is breached by a failure to present the instrument for payment. Such an omission is not laches, and affords the maker no ground for complaint. By the very terms of the statute, the holder of a note is relieved of any such obligation insofar as the maker is concerned.
>
> "The duty of the holder of a note toward the maker cannot be assimilated to the duty of the duty of the holder of a check toward the drawer. In the first instance, the maker is primarily liable; in the latter, the drawer is only liable after dishonor. And again, while the statute excuses presentment of the instrument as to the maker of a note, presentment is required within a reasonable time in the case of a check at the peril of discharging the drawer."

The other cases cited are in point and to the same effect.

The plaintiff in error seeks in his brief to create the impression that the loss which he had sustained by virtue of the failure of the National Bank of Cleburne, the original payee of the note, was occasioned through the negligence of the defendant in error in failing to present his note for payment at the place where the note, by its terms, was made payable. It is not necessary, in our opinion, to present the note for payment in order to charge the party primarily liable thereon, and, therefore, had the note not been presented the plaintiff in error would have, nevertheless, been liable thereon. However the record discloses affirmatively that the note was presented numerous times by Mr. Gentry. In this connection

we call attention to the following testimony disclosed by the transcript of record.

Mr. McKinney testified:

"Q. What did you do with the National Bank of Cleburne?

A. At what time?

Q. Say after August 1921, during the time you had charge of the Federal Reserve Bank?

A. Shortly after I went to the Federal Reserve, before some week or ten days I would think, it occurred to me that it would be proper thing to do to present that paper to the indorsing bank for collection.

Q. You then sent the paper down there by Mr. Gentry, he was your messenger?

A. He was the messenger, yes, sir.

Q. Along about the 11th of August you began sending down there by a messenger?

A. Somewhere in that vicinity, I don't know the exact date.

Q. You said you reached the conclusion that it would be proper to send that paper to the National Bank at Cleburne by a messenger?

A. Yes, sir.

Q. Is it not a fact that that conclusion was brought about by your uneasiness as to the condition of the bank?

A. Not necessarily. We had had experience with one bank some months previous—the First National Bank of Hearne, in which we had sent them some paper and authorized them to act as our agent in the collection of it and they collected it and did not remit to us. And that was my judgment, I thought it was better not to constitute the National Bank of Cleburne our agent in the collection of that paper." (Tr. 17-18)

Mr. Gentry testified:

"Q. Now did you take the note of Mr. D. S. Sowell or D. S. Sowell Grain Company to Cleburne?

A. Yes, sir; it was included in the past due paper that I had; I had it with me, yes, sir.

Q. You took that note?

A. Yes, sir.

Q. Did you present it to the bank for payment?

A. Yes, sir." (Tr. 35)

The note having been made payable at the National Bank of Cleburne by the maker, said bank became the agent of the maker to pay the same and it follows, therefore, that the plaintiff in error has been damaged by the misconduct of its own agent and not by the misconduct of the defendant in error or anyone for whose actions the defendant in error is responsible.

It is submitted, therefore, that even in the absence of a waiver of protest, notice of dishonor, and diligence in collection under the terms of the Negotiable Instruments Act itself, the defendant in error owed no duty to the plaintiff in error to present the note for payment or to give notice thereon, and, owing no duty in this respect, the plaintiff in error is in no position to assert negligence on these grounds.

It is further submitted that the undisputed facts show that the note was presented several times at the place where, by its terms, it was made payable.

POINT IV.

The maker of a negotiable promissory note cannot require a bona fide holder for value thereof as collateral

security to exhaust its other collateral, even though the maker has a valid defense to the note in the hands of the original payee.

AUTHORITIES

Swift vs Tyson, 16 How. 1;
McCarty et al vs Roots et al, 21 How., 432;
Haas vs Bank of Commerce, 60 N. W. 85;
Citizens State Bank vs Iddings, 84 N. W. 78;
Moyses et al vs Bell, 114 Pac. 193;
Dallemand vs Bank, 54 Ill. App. 600;
Third National Bank vs Harrison et al, 10 Fed. 243.

ARGUMENT

The fourth Specification of Error relied upon by plaintiff in error to which this point is directed raises the question as to whether or not a court will apply the equitable doctrine of marshalling assets to a bona fide holder of negotiable paper pledged as collateral to an indebtedness. Defendant in error contends that this equitable doctrine is not applicable in this case. As we understand this doctrine, it is applicable only in those cases in which a junior lien holder seeks to compel a senior lien holder to exhaust security which he has and which the junior lien holder might not have access to, and will never be applied except in the case of the common debtor to both creditors for the protection of the junior creditor, and will be applied then only when it may be done without injustice and will not compel a resort to dubious securities.

The defendant in error held the note sued upon as collateral security to the indebtedness of the National Bank of Cleburne, Cleburne, Texas, which said indebted-

ness was largely in excess of the note sued upon. There was no question but that the defendant in error received such note as collateral for a valuable consideration long prior to its maturity and without knowledge of any defense to, or irregularity in, said note. In fact no such defense arose until the insolvency of the bank some months after the note was acquired by the defendant in error, and the defense which then arose was merely that of offset for a deposit in the insolvent bank. The very purpose of taking the note sued upon as collateral was to assure the collection of the indebtedness due by the National Bank of Cleburne to the defendant in error at the maturity thereof. The plaintiff in error in his answer in the lower court did not deny the genuineness of the indebtedness which his note secured nor did he claim that said indebtedness had been paid. The defendant in error was entitled to payment of the indebtedness owed it by the National Bank of Cleburne immediately upon the maturity of the evidence of indebtedness which the note in suit secured. As shown in the original answer of the plaintiff in error, the National Bank of Cleburne closed its doors and ceased to do business on the 17th day of October, 1921 (Tr. 7), about seventeen months before the trial of this case in the district court. No claim whatsoever was made that the principal indebtedness which the note secured had been paid. In other words, the defendant in error, although entitled to the payment of the indebtedness of the National Bank of Cleburne for some seventeen months, was still deprived of the use and enjoyment of its money on the date of the trial of the cause below, and plaintiff in error was seeking to have the lower court restrain the defendant in error from the prosecution of its suit and force the defendant in error

to resort to such other collateral as it might have had in its possession for the satisfaction of its indebtedness. The very fact that seventeen months had expired since the National Bank of Cleburne closed its doors and ceased to do business, coupled with the fact that the defendant in error had not been able to collect its indebtedness, was in itself sufficient reason for the lower court to deny plaintiff in error the relief asked for.

In addition to this reason, however, there are other compelling reasons why the relief asked for should be denied. The makers of other notes held by plaintiff in error as collateral to its indebtedness might have equally as good equities as the plaintiff in error in this suit. None of them are before the court and the court has no way of determining with definiteness that the defendant in error can collect its indebtedness from its other collateral.

In the meantime, should the court force the defendant in error to exhaust its other collateral, the maker of the note, although solvent at this time, might become insolvent and a judgment might become worthless. In the event of such a contingency, should the defendant in error fail to recover its indebtedness in full from its other collateral it would lose that much of the indebtedness represented by this note on account of such action. It is contended that this would be wholly inequitable to the rights of this defendant in error and would place it in a position which no court of law or equity could justify. Indeed were such a rule of law established it would be such a restriction upon the use of negotiable paper that commercial banks could offer very little security for money borrowed by them, for it is well known that the borrowing customers

of commercial banks are ordinarily depositors therein and in the event of insolvency or suspension from business the holder of any notes which such bank might pledge as collateral for money borrowed would take them subject to the rights of the depositors and makers of the notes to delay the collection thereon until such time as it could be determined whether or not they could have the right of offset.

The result of such a rule would certainly impair the efficiency of Federal reserve banks, which were created primarily for the purpose of extending loans to their member banks, and a situation might develop that the reserve funds of the country which are lodged in Federal reserve banks would be seriously hampered and their efficiency to this extent impaired.

The plaintiff in error executed and empowered the payee to circulate in the business world a negotiable instrument. He was charged with knowledge that if such instrument passed into the hands of a bona fide holder for value prior to its maturity that the note would be free of any defense. That the defendant in error was a bona fide holder for value was not and cannot be questioned. The authorities are voluminous to the effect that one who takes a note prior to its maturity, without notice of any defects as collateral security to another indebtedness, becomes a bona fide holder for value to the extent of the indebtedness which said collateral note secures.

Swift vs Tyson; McCarty et al vs Roots, et al, supra.

The identical question under consideration has been before the courts of this country on several occasions. One of the leading cases was decided by the Supreme

Court of Nebraska in the case of Haas vs Bank of Commerce, supra. In this case the court says:

> "So far, however, as the argument calls any attention to the remaining assignments, a discussion of two questions disposes of them all.
>
> "The first arises from the contention of the plaintiff in error that the Bank of Commerce held other collateral, being notes of other persons, sufficient to satisfy the debt of the Bank of Omaha, and that it should be required to exhaust the other collateral before proceeding against the plaintiff in error. It is claimed that the case, in this aspect, is brought within the principle whereby the holder of a junior security upon a fund may compel the holder of a senior security upon that fund, who also holds other security, to exhaust such other security before proceeding against the fund which is held by both. We do not think that this doctrine of marshalling has ever been applied to any such case as that under consideration. It has been frequently decided that the doctrine referred to will never be applied, except, in the case of a common debtor to both creditors, for the protection of the junior creditor, and then only where it may be done without injustice, and will not compel a resort to dubious securities. It is equally well established that a creditor holding two or more securities for the same debt may proceed to enforce either or all of them, and will not, as a general proposition, be required to proceed in any particular order. In this case the makers of the other notes were not before the court, and for that reason alone the plaintiff in error was not entitled to the relief he sought. * * * The makers of other notes may have had similar defenses, or equal, or even superior equities. But, aside from this, the plaintiff in error had no right at this time, or in this manner, to seek such relief. There are cases where somewhat similar relief has been granted in favor of one who occupied the position of a surety,

but we know of no case like the present. In Prout vs Lomar, 79 Ill. 331, a bill in equity charged that certain notes, the collection of which it sought to enjoin, were given to the complainant for the accomodation of Lomar, and that they were held by the respondents as collateral to a debt from Lomar. It was also alleged that the bank had other full and adequate securitiy. The court said: 'We are aware of no principle by which the bank can be compelled to any particular course in regard to such collateral as it may have. We fail to perceive any obligation on the bank to convert its securities, or do any other act at the instance of this party, if he was a surety. In certain cases—and this is not one—a surety to a negotiable note may notify the holder to proceed against the principal, on the maturity of the note. Independent of this, a surety cannot compel the holder to proceed against others before proceeding against himself, and exhaust such other remedies as he may have.' The case of Bank vs Harrison, 10 Fed. 243, was one presenting a somewhat similar state of facts. Alexander borrowed certain money from the bank and deposited certain notes of third persons as collateral security; among these a note of Harrison. It was alleged that this note was given on account of an illegal transaction. It was held that the transaction was not such as to defeat the note in the hands of a bona fide holder for value, and it was further held that the fact that the principal debtor had on deposit in the bank sufficient funds to discharge the debt, without recourse to the collateral, was no defense in an action on the note. If no such equity exists as against the principal debtor, certainly none can exist against the makers of other collateral notes."

Other cases directly in point are as follows:

Citizens State Bank vs Iddings, supra. The Court says:

> "It is further considered that the $9,000 loan was secured by other bills of lading. That the grain thus pledged was wrongfully delivered by the same carrier to the grain company; that an action had been instituted by the bank to recover of the carrier the value of the property so diverted, and that this action should not proceed to judgment until it is determined that the other has proven fruitless. It is claimed that the doctrine of marshalling securities is applicable to this case. We think it is not. It is, of course, a well established rule of equity that where there are two creditors of a common debtor, who has several funds, all of which can be reached by the other, the former must first seek satisfaction out of that fund which the latter cannot touch. * * * This doctrine is applicable only to cases in which two creditors are pursuing the same common debtor. This is a case in which a creditor has two common debtors, one of which claims exemption from liability on the ground that the other ought to be first sued, and compelled, if possible, to satisfy the debt. Iddings is not, in this action, seeking to enforce his judgment against the grain company. He is merely seeking to prevent the bank from enforcing its judgment against him. The case is not different in any essential particular from one in which a mortgagee sues for conversion of part of the chattels covered by his mortgage. We have never understood that in such an action the wrongdoer may defend on the ground that he has a claim against the mortgagor, and that the remaining security is sufficient to satisfy the mortgage debt. The case of Haas vs Bank, 60 N. W. 85, is, we think, exactly in point."

The court then holds that the doctrine of marshalling cannot be applied.

Moyses et al vs Bell, supra, Supreme Court of Washington. In this case the court says:

> "Appellant, asking the equitable relief that respondents be required to first exhaust other collateral, or that he be subrogated thereto, in his answer alleged: 'That as this defendant is informed, and verily believes, the plaintiffs acquired the note sued upon, if at all, as collateral security to another and principal obligation of the Great Western Beet Sugar Company and along with a large amount of other collateral and securities, the amount or value of which to this defendant is unknown, but which he alleged is largely in excess of the consideration paid by him for said principal obligation, if any was so paid, and also largely in excess of said principal obligation or note.' There was evidence that collateral of the par value of $80,000 was transferred to the respondents by the bank when they succeeded to its rights, but there is no evidence of the actual value of such collateral. The appellant did not urge this defense on the trial below, although pleaded, nor did he ask findings relative thereto. It appears that the Great Western Beet Sugar Company has passed into the hands of a receiver. After respondents have fully satisfied the debt due them from the Great Western Beet Sugar Company by collecting and applying the proceeds of the collateral, the remainder of such collateral, if any, will belong to the company, or its receiver. The appellant insists that we should make an order of subrogation, so that he may be enabled to look directly to any surplus collateral now held by respondents which they may not need to secure the entire indebtedness due them; but, in view of the rights of the receiver, and

circumstances which would render its application inequitable and when the defenses are such, the reasons for the rule failing, it will not be enforced."

It is to be observed that the opinion in the case of Simmons vs Hodges, 250 Fed., 424, was written by Judge Grubbs, who also wrote the opinion in this case for the Circuit Court of Appeals. It is submitted, therefore, that the plaintiff in error could not require defendant in error to exhaust its other collateral before proceeding upon the note sued upon.

It is respectfully submitted that the record presents no reversible error and that the judgment of the trial court should be affirmed.

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of other possible creditors who might also be entitled to subrogation and to participate in the same collateral, we think no such order should be made in this action."

Another case, and one involving facts almost identical to those in the case at bar, is the case of Dallemand vs Bank, supra. In this case, Dallemand was a customer of a private bank operating under the name of Shafer and Company. Shafer and Company failed in 1893. Some time before the failure, Dallemand induced Shafer and Company to discount for him two notes for $5,000 each. At the time the bank failed, Dallemand had on deposit with Shafer and Company a sum of money almost sufficient to pay the notes. Shafer and Company, prior to its failure, borrowed money from the plaintiff bank and transferred Dallemand's notes as collateral security therefor. The plaintiff bank had also, in addition to the Dallemand notes, other notes which had been transferred to it by Shafer and Company as collateral security. The collateral held by the plaintiff bank exceeded the indebtedness of Shafer and Company to it by an aggregate amount of $40,000. Suit was instituted against Dallemand on the two notes above referred to, and he sought as a defense to force the plaintiff bank to exhaust its other collateral before proceeding against him, and in this connection offered to indemnify the plaintiff to the extent of his notes if the marshalling should be allowed.

In passing upon the case, the court mentions the fact that Dallemand did not offer to take the plaintiff's bank's place by paying Shafer and Company's indebted-

ness. In passing upon this case, the court quotes from another case as follows:

> "It may be very advantageous and all important to them (the bank) to receive their money with as little delay as possible; and being entitled to have received their debts long since, if they could have got them, it would therefore be contrary to both law and equity to pass a decree that would, in its effect, delay them in the receipt thereof a single minute longer than is indispensably necessary for final determination of the controversy."

and then continues in its own language:

> "This was said where the facts had no resemblance to those here, but the principle that equity regards the interests of creditors as well as of debtors, is well put.
>
> "The decree dismissing the bill is affirmed."

The plaintiff in error has cited three cases which, in our opinion, are not in point. These cases go no further than to lay down the rule that an innocent holder of negotaible paper cannot wilfully inflict a wrong upon the party primarily liable in order to favor a fraudulent endorser who in justice and good conscience ought to pay the bill. The facts in these cases show clearly that the holder had a simple, adequate, and complete right to affect immediate collection from a solvent endorser after having been put on notice of the defenses which the maker might have urged against the original payee had this course been pursued. As is stated in the case of Second National Bank vs McGhee, 241 S. W., 287,

> "Furthermore, it must be remembered that it is not in all circumstances that the rule in the Van Winkle Gin Company case is to be applied. There may be